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Case Nos: PT-2020-000041, PT-2020-000043, PT-2020-000044, PT-2020-000045, PT-2020-000046

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 8th June 2022

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

VALLEY VIEW HEALTH CENTRE (A FIRM) **COLEFORD FAMILY DOCTORS (A FIRM)** **BUSHBURY HEALTH CENTRE (A FIRM)** **ST ANDREWS MEDICAL CENTRE (A FIRM)** **ST KEVERNE HEALTH CENTRE (A FIRM)**	**Claimants**
- and -	
NHS PROPERTY SERVICES LIMITED	**Defendant**

- -
- -

John De Waal QC, Katrina Mather, and William Golightly (instructed by Capital Law Limited) for the Claimants
Jonathan Gaunt QC, Nathaniel Duckworth, and Gavin Bennison (instructed by Bevan Brittan LLP) for the Defendant

Hearing dates: 17th, 18th, 21st, 22nd, 23rd, 24th, 25th, 28th, 29th, 30th, 31st March 2022, 1st, 4th, 5th, and 6th April 2022

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APPROVED JUDGMENT

Mr Justice Edwin Johnson:

The structure of this judgment

1. This judgment is, necessarily, a lengthy judgment. For ease of reference, I provide the following guide to the different sections of the judgment. There is also an appendix to the judgment which contains my assessment of the witnesses who gave oral evidence in this trial.

Introduction	Paragraphs 2-12
Conventions of this judgment	Paragraphs 13-16
The context of this dispute	Paragraphs 17-41
The parties	Paragraphs 42-54
The Valley View Premises	Paragraphs 55-64
The Coleford Premises	Paragraphs 65-68
The Bushbury Premises	Paragraphs 69-72
The St Andrews Premises	Paragraphs 73-80
The St Keverne Premises	Paragraphs 81-83
The actions	Paragraphs 84-89
The issues in Trial 1 – common issues	Paragraphs 90-103
The issues in Trial 1 – Valley View	Paragraphs 104-106
The issues in Trial 1 - Coleford	Paragraphs 107-109
The issues in Trial 1 – Bushbury	Paragraphs 110-113
The issues in Trial 1 – St Andrews	Paragraphs 114-115
The issues in Trial 1 – St Keverne	Paragraphs 116-117
The evidence	Paragraphs 118-125
The Claimants' Note on Premises Costs Directions and Subsidies	Paragraphs 126-131
Valley View - relevant history	Paragraphs 132-166
Valley View – discussion and determination of the issues	
Valley View – tenancy at will or periodic tenancy?	Paragraphs 167-189
Valley View – landlord's obligations (provision of services)	Paragraphs 190-196
Valley View – is the rent all-inclusive?/tenant's obligations (payment for services)	Paragraphs 197-220
Valley View – management costs	Paragraphs 221-243
Coleford - relevant history	Paragraphs 244-250
Coleford – discussion and determination of the issues	
Coleford – landlord's obligations (provision of services)	Paragraphs 251-258
Coleford – tenant's obligations (payment for services)	Paragraphs 259-275
Coleford – is there a service charge cap?	Paragraphs 276-290
Coleford – management costs	Paragraphs 291-292

Coleford - limitation	Paragraphs 293-310
Coleford – current extent of the demised premises	Paragraphs 311-325
Coleford – historic occupation	Paragraphs 326-356
Bushbury – relevant history	Paragraphs 357-361
Bushbury – discussion and determination of the issues	
Bushbury – tenant's obligations (payment for services)	Paragraphs 362-375
Bushbury – the alternative claim for a restitutionary remedy	Paragraphs 376-377
Bushbury – management costs	Paragraphs 378-380
Bushbury - limitation	Paragraphs 381-396
Bushbury – historic occupation	Paragraphs 397-415
St Andrews – relevant history	Paragraphs 416-430
St Andrews – discussion and determination of the issues	
St Andrews – tenancy at will or periodic tenancy?	Paragraphs 431-449
St Andrews – tenant's obligations (payment for services)	Paragraphs 450-455
St Andrews – management costs	Paragraphs 456-461
St Andrews – current extent of the demised premises	Paragraphs 462-483
St Andrews – historic occupation	Paragraphs 484-504
St Keverne – relevant history	Paragraphs 505-515
St Keverne – discussion and determination of the issues	
St Keverne - is the rent all-inclusive?/tenant's obligations (payment for services)	Paragraphs 516-550
St Keverne – landlord's obligations (provision of services)	Paragraphs 551-559
St Keverne – management costs	Paragraphs 560-561
Should the Charging Policy Declarations be made?	Paragraphs 562-624
Conclusions	Paragraph 625
Outcome	Paragraphs 626-627
Postscript	Paragraphs 628-630
Appendix (witness assessment)	

Introduction

2. This is my reserved judgment following the combined trial of five actions, each commenced by a particular medical practice against the Defendant, NHS Property Services Limited.

3. The Claimants in each action comprise the partners (in some cases including former partners) in a partnership of GPs providing medical services from a set of

premises. In each case the relevant Claimants occupy or have (in the case of former partners) occupied their premises pursuant to a tenancy. The Defendant is the owner of the interest in each of these premises which is immediately reversionary upon the relevant tenancy. The Defendant is therefore the Claimants' landlord.

4. The Defendant is a private limited company which was set up as part of a major re-organisation of the NHS. Its shareholding is held by the Secretary of State. The Defendant was set up to hold and administer NHS properties following this re-organisation. This was effected by a statutory transfer to the Defendant, on 1st April 2013, of some 3,600 properties, previously owned by Primary Care Trusts. Included in these properties were the five sets of premises which are, respectively, the subject of this trial.

5. In three of the five actions it is common ground that the relevant Claimants occupy their premises, in each case, pursuant to an implied periodic tenancy. In the two other actions there is a dispute between the relevant parties as to whether the relevant Claimants occupy their premises, in each case, pursuant to an implied periodic tenancy, or pursuant to a tenancy at will.

6. The principal battleground between the parties concerns service charges. The five actions were commenced by the Claimants seeking declaratory relief to the effect that certain policies operated by the Defendant, in terms of the charging of service charges, had not been incorporated into the terms of the Claimants' tenancies, with the consequence that those policies could not be relied upon as the legal basis for requiring the Claimants to pay service charges under their tenancies.

7. The Defendant has admitted that the policies have not been incorporated into the Claimants' tenancies, and thus do not provide the legal basis for the payment of service charges. The Defendant does however say that the Claimants are liable under their tenancies to pay service charges in respect of the services provided, or said to be provided by the Defendant in respect of the premises occupied by the Claimants. On this basis the Defendant has counterclaimed in the five actions for alleged arrears of service charges. The total of these alleged arrears is substantial, amounting to a combined figure in excess of £1 million.

8. The parties are in substantial dispute over the recoverability of the alleged arrears of service charges. The Claimants say, for a variety of reasons, that the alleged arrears are not recoverable. The Defendant says that they are recoverable. The Claimants also maintain their claims for declaratory relief. The Claimants say that the declarations should still be made, notwithstanding the Defendant's admissions in this respect.

9. The Claimants are supported in these actions by the British Medical Association (**"the BMA"**). This reflects the fact that the BMA and the Claimants regard the present five actions as test cases for many other premises, owned by the Defendant and occupied by GP practices, where the recoverability of service charges is in dispute.

10. The reasons advanced by the Claimants for the non-recoverability of service charges range, as is often the case in service charge disputes, from arguments that the relevant service charges are not recoverable under the terms of the Claimants' tenancies, all the way through to challenges to specific items of expenditure where the relevant cost is said to have been unreasonable, or the relevant work is said to have been sub-standard or not done at all. It was originally intended that all these various issues should be tried in this trial but, for the reasons which I gave in a judgment which I delivered at the pre-trial review in these five actions, I directed a split trial of the actions.

11. In this, the first part of the split trial, I am concerned with the Claimants' claims for declaratory relief, the dispute over the nature of the tenancies (so far as this arises), the principle of the Defendant's obligation (if any) to provide services, and the principle of the Defendant's entitlement to levy the service charges which are the subject matter of its counterclaims. All other issues concerning the quantification of the alleged arrears of service charges are for the second part of the split trial. I am not therefore, in this judgment, concerned with the granular detail of this dispute; that is to say questions such as whether and to what extent specific services were in fact provided, whether they were provided to a reasonable standard, whether the Defendant in fact incurred the relevant cost and, if so, in what amount, and whether the charges were reasonably incurred and reasonable in their amount. The only exceptions to this are where it is necessary to carry out a limited investigation of a particular service or alleged service, for the purposes of resolving an issue of principle.

12. At the trial the Claimants were all represented by John de Waal QC, Katrina Mather, and William Golightly, counsel. The Defendants were represented by Jonathan Gaunt QC, Nathaniel Duckworth, and Gavin Bennison, counsel. I am most grateful to all counsel and those instructing them for their assistance and hard work in ensuring the smooth and efficient running of the trial. The trial itself was conducted on a hybrid basis, with some remote participation. The Opus 2 platform was used for the management of the documents in the trial.

<u>The conventions of this judgment</u>

13. I will refer to this first part of the split trial of these five actions as Trial 1. I will refer to the second part of the split trial, for which directions will be given following the conclusion of Trial 1, as Trial 2. Other definitions are as established in the course of this judgment. I have added italics to quotations.

14. In landlord and tenant law and practice the expressions *"lease"* and *"tenancy"* are often used on an interchangeable basis. In this judgment I will, as a general rule, use *"lease"* to mean a letting created by a document under seal, and *"tenancy"* to mean a letting created otherwise than by a document under seal. It is also convenient, as a general rule in this judgment, to use the expression *"service charge"*, and associated expressions (including *"services"*) to refer to the various services and costs which are in issue in the five actions. It should however be kept in mind that some particular items of services and/or costs may be more accurately described in some other way. Where this is relevant in this judgment, I will draw out the required distinction.

15. Where I refer to particular evidence of a particular witness on a matter of fact, I am accepting that evidence, unless otherwise stated.

16. The work of cross examination and submissions was shared between the counsel teams on each side. I will therefore refer to submissions and cross examination as the submissions and cross examination of, respectively, the Claimants and the Defendant, rather than referring to individual counsel.

The context of this dispute

17. This is not an ordinary service charge dispute. Nor is it an ordinary landlord and tenant dispute. In order to understand how the present dispute has arisen, and in order to understand its peculiar features, it is necessary to have some understanding of the relevant history and workings of the NHS, and as to how this dispute has arisen.

18. Prior to 2000, many of the properties now vested in the Defendant were owned by the Secretary of State for Health (**"the Secretary of State"**) and administered by individual Health Authorities acting under delegated powers. Section 52 of the National Health Service Act 1977 and later Section 98 of the National Health Service Act 2006 gave the Secretary of State power to make properties suitable for the provision of medical services available to GPs, on such terms as the Secretary of State thought fit.

19. In 2000 Primary Care Trusts (**"PCTs"**) were first created under the Health Act 1999. Section 5 of that Act, and later Section 21(3) of the National Health Service Act 2006 gave the PCTs power to make premises available to GPs for the purposes of providing primary medical care, again on such terms as they saw fit. From 2004 onwards, PCTs were also responsible for commissioning primary health care services, which they did by entering into contracts with the GPs and by funding some of their outgoings, including rent and certain service charges. PCTs thus had a dual role. In those cases where the PCTs made premises available to GP practices, or took over premises occupied by GP practices, the PCTs were the landlords of the relevant GP practices. At the same time the PCTs were also the parties which commissioned and funded the primary health care services commissioned from and provided by the relevant GP practices.

20. In 2013 a major re-organisation of the NHS took place, in which lies the genesis of this dispute. For present purposes the key feature of this re-organisation was that with effect from the end of March 2013, PCTs were abolished.

21. So far as the role of PCTs was concerned with commissioning and funding the services of GPs, this was taken over by NHS England, which is the operating name of the National Health Service Commissioning Board, a statutory corporation established by Section 9 of the Health and Social Care Act 2012. NHS England (**"NHSE"**) commissions health services by entering into contracts with GPs or, since 2016, by delegating responsibility for commissioning and funding to local Clinical Commissioning Groups (**"CCGs"**). CCGs are statutory bodies corporate, established under s.10 of the Health and Social Care Act 2012, which are responsible for the planning and commissioning of health services in

their local area. In the case of the five GP practices with which I am concerned, there has been such delegation to local CCGs.

22. So far as the role of PCTs was concerned with the holding and management of premises occupied by GP practices, this was taken over by the Defendant. As I have explained above, the Defendant is a private limited company established by the Secretary of State, in the exercise of powers under Section 223 of the National Health Service Act 2006, to hold and administer NHS properties after the reorganisation of the NHS in April 2013. The Defendant is not regulated by statute. Its powers are set out in its articles of association, and its shareholding is held by the Secretary of State. The Defendant was incorporated on 20th December 2011.

23. The transfer of properties to the Defendant was achieved by a series of statutory transfer schemes made under Section 300 of the Health and Social Care Act 2012, taking effect on 1st April 2013. Under each transfer scheme, the properties comprised in that scheme were vested in the Defendant subject to all existing leases, licences and other rights of the existing occupiers, together with the benefit and burden of all rights, obligations, and liabilities (including accrued rights, obligations and liabilities) pertaining to those properties.

24. The properties transferred to the Defendant did not comprise the entirety of the NHS estate previously held by PCTs. A substantial part of the estate was transferred to NHS Trusts, where NHS Trusts were the major occupants of the relevant buildings. In the case of the remaining properties the decision was taken to vest these properties in a new property company, with the intention that the transferred properties should be held and managed on a more efficient and commercial basis than had previously been the case. Of the estate of some 3,600 properties transferred to the Defendant, around one third comprised premises occupied by GP practices.

25. Turning more specifically to the funding of GP services, GPs are not employees of an NHS body and, as I understand the position, have never been employees of an NHS body.

26. Before 2004, GPs provided primary care medical services under a statutory (rather than contractual) scheme. GPs' statutory terms of service were supplemented by the Statement of Fees and Allowances, known colloquially as the Red Book, under which GPs could obtain reimbursement of what they spent on rent for the premises which they occupied, as well as rates, water (including sewerage), and clinical waste removal.

27. Since 2004, GPs have provided primary care medical services under individual contracts. Although there are other kinds of NHS contracts, all five of the Claimant practices provide medical services under a General Medical Services (**"GMS"**) Contract with a CCG. GMS contracts are not time limited. They are treated as existing between the commissioning body (now NHSE or a CCG) and the partners in the relevant GP practice as they exist from time to time. These GMS contracts import the provisions of the 2004 and 2013 National Health Service (General Medical Services – Premises Costs) (England) Directions made

by the Secretary of State in the exercise of statutory powers (respectively **"the 2004 Directions"** and **"the 2013 Directions"**).

28. It has not been necessary for me to examine the terms of these GMS contracts, but I was told that they are not the kind of contracts which can simply be the subject of unilateral termination. A termination of such a contract would impact upon the primary care services available in the local area. It was explained to me that if GPs wished to move premises, they would need to give notice to terminate the supply of medical services to the relevant CCG, and the relevant CCG would have to accept the termination. Any new premises would need to be fit for clinical use, and would also have to be approved by the relevant CCG. Put more simply, and speaking in practical rather than legal terms, GPs are not the kind of commercial tenants who can easily up sticks and move from their premises, if commercial and/or legal factors require, or favour a move.

29. Under the 2004 Directions and the 2013 Directions GPs can obtain various forms of financial assistance with their premises. By reference to paragraphs 31, 46 and 47 of the 2013 Directions GPs can apply for and obtain financial assistance with the rent that they pay for the premises from which they practise. By paragraph 32, this financial assistance is limited to the lower of the rent actually paid and the current market rental value of the relevant premises, in each case plus any VAT payable. GPs can also obtain financial assistance, by paragraph 46, with service charges paid in respect of business rates, water and sewerage charges and collection and disposal of clinical waste. GPs may also be able to obtain financial assistance in respect of other services provided by a landlord, if the relevant charges fall within what is referred to in paragraph 46(1)(b)(iv) as *"a utilities and service charge"*, covering the matters referred to in paragraph 46(2). This financial assistance, so far as it applies to service charges, is subject to a form of capping provision in paragraph 47. Paragraph 6 of the 2013 Directions also allows for the provision of *"such financial assistance as it* [the Board] *thinks fit in order to pay, or contribute towards, the premises costs of a contractor in circumstances that are not contemplated by the payment arrangements set out in these Directions"*. Some examples are then given of circumstances where such financial assistance could be provided. The 2004 Directions contained broadly similar provisions, at paragraphs 6, 46, and 47.

30. It is convenient to refer to the financial assistance which is now available pursuant to the 2013 Directions, and was previously available pursuant to the 2004 Directions, as reimbursement. This was the way in which this financial assistance was routinely referred to the evidence in the actions. It should however be kept in mind that payments made under the 2004 and 2013 Directions can be applied for even before the GPs have made payment to their landlord and can be made directly to a landlord. GPs can apply for reimbursement of rent and service charges at any time provided that the liability accrued within six years of the date on which the application is made.

31. There are two important points to note in relation to GP funding arrangements. First, GPs can recover the rent which they pay for their premises, assuming that it does not exceed what is determined to be the current market rent. Second, GPs can obtain assistance with service charges payable in respect of their premises,

but only to a limited extent, now governed by paragraphs 46 and 47 of the 2013 Directions.

32. One other point which featured in the arguments, and is worth recording, is that not all GPs practise from properties owned by the Defendant and formerly owned by the PCTs. Some GPs practise from their own premises, either as owners of the relevant freehold or pursuant to a letting from a private landlord. The point was however stressed to me by the Claimants that such GPs could also obtain financial assistance, in terms of the cost or notional cost of their occupation of the relevant premises, in a similar fashion to GPs occupying premises owned by the Defendant.

33. Returning to the statutory transfer of part of the NHS estate to the Defendant, it is clear, from all the evidence which I have heard, that the Defendant inherited significant challenges. The terms of occupancy of these properties were poorly documented. In the case of GP practices, only around 30% had a written lease of their premises or some other kind of occupancy document. In the remaining 70% of cases there was no formal record of the terms of occupancy. In addition to this the management of these properties by the PCTs does not appear to have been run on a commercial basis. In particular, it is clear from all the evidence which I have heard that the PCTs were not rigorous, either in the application of the reimbursement provisions in what were then the 2004 Directions, or in the collection of service charges. Although there was, at least in theory and subject to any particular arrangements relating to a particular GP practice, a gap between what GPs could obtain, in terms of financial assistance in relation to service charges, and what GPs might contractually be required to pay, in terms of service charges, the existence of this gap does not appear to have caused problems.

34. The parties were not agreed as to the basis on which this situation existed. Nevertheless, what is clear from all the evidence which I have received and heard, and I so find, is that the PCTs (i) were prepared to accept, whether or not they gave any particular thought to the matter, a shortfall between their expenditure on premises occupied by GP practices and the sums recovered by way of service charge from GP practices in respect of this expenditure, and (ii) were prepared to fund this shortfall, whether or not they gave any particular thought to the matter, from their own funds. This may have been because PCTs were prepared to provide, from their own funds, reimbursement in respect of service charge expenditure going beyond what was strictly provided for by what were then the 2004 Directions. This may have been because PCTs were not, at least generally, active in charging for or pursuing shortfalls in service charge expenditure from GPs, but instead used their own funds to cover the shortfalls. This may have been the result of a combination of these factors. The relevant point, for present purposes, is that the PCTs, whether or not they gave any particular thought to the matter, were prepared to fund this shortfall, and did fund this shortfall. I do not find that this was a uniform practice. Amongst the present cases there is some evidence of practices being required by PCTs to pay non-reimbursed service charges. It is however clear, as I have said, that PCTs were prepared to accept shortfalls in the recovery of service charges.

35. All this changed following the arrival of the Defendant as the dedicated property management company for the relevant part of the NHS estate. The intention was that the Defendant should run its portfolio of properties on a commercial basis, with full recovery, through service charges, of the money spent on providing services to its properties, including premises occupied by GPs. The new approach was not implemented immediately from 1st April 2013. It was only as from 2015/2016 that the Defendant began to move to the full recovery of service charge expenditure on its properties. The evidence was (and I so find) that, in the period prior to that, the Defendant, at least as a general rule, charged by reference to what the PCTs had charged.

36. As part of the new approach the Defendant produced and published formal Charging Policies which set out the approach which the Defendant would take to charging for rent and services. These Charging Policies were published annually, in 2015/2016, 2016/2017, and (in a consolidated form) 2017/2018. It is these Charging Policies which are the subject of the Claimants' claims for declaratory relief.

37. The performance of the Defendant in managing the properties which were the subject of the statutory transfers in 2013 has been the subject of reports by the National Audit Office, in May 2014 and June 2019, and by the Public Accounts Committee in November 2019. The content of these reports is not directly relevant to the issues which fall to be determined in Trial 1. I was however referred to these reports, as part of the background to the five actions. I note, by way of background, that these reports (most notably the PAC report) contain criticisms of the performance of the Defendant, while also acknowledging the significant problems which the Defendant inherited from the previous management of the properties.

38. In terms of the process of the levying of service charges the practice of the Defendant, as from 2015/2016, has been to provide annual charging schedules (**"the Annual Charging Schedules"**) at the beginning of the service charge year. These Annual Charging Schedules were originally described as Tenant Backing Schedules, and were accompanied by a Guide to your Tenancy Charges. An Annual Charging Schedule, as it is now called, is provided for each set of premises occupied by a GP practice, and sets out, in respect of those premises, the services to be provided for the relevant year, and the amount to be invoiced by way of estimated service charges for the relevant year. At the end of the relevant year the Defendant undertakes what was referred to in the evidence as a *"true-up"* process. This process, which is better described as a reconciliation process, involves reconciling the actual service charge expenditure for the year against the estimated service charge expenditure, and applying a credit or demanding an additional balancing payment in respect of the relevant premises. In terms of actual demands for the payment of service charges, these are made by invoices rendered to the relevant practice.

39. I should stress that what I have described in my previous paragraph is what I understand from the evidence to be the general practice of the Defendant, in terms of the process of levying of service charges. I am not finding that this process had been rigorously observed in every case. More importantly, I am not

describing the actual contractual machinery (if any) for the levying of service charges which may exist in any particular case.

40. The reference to the service charge year also requires an explanation. The claims in the five actions for alleged arrears of service charge are made by reference to service charge years. So far as service charges are or may be recoverable, the evidence demonstrated (and I so find) that the Defendant and, before the Defendant, the PCTs had always treated the service charge year as running from 1st April to 31st March. So, a reference to the 2013/2014 service charge year means the year running from 1st April 2013 to 31st March 2014. I understood it to be common ground between the parties that the service charge year should be treated as running between these dates, if and so far as a service charge may be recoverable in any particular action.

41. The essential problem which now exists between the Defendant, on the one side, and GP practices, on the other side, is that the Defendant is seeking to achieve full recovery, through the payment of service charges, of the costs of providing services to GP practices. The result is that GP practices have, in recent years, been receiving demands for the payment of service charges in substantially greater sums than was the case when the PCTs were responsible for the management of GPs' premises. As the Claimants put the matter, in a Note produced as part of their written submissions for Trial 1, the Claimants have found themselves *"in the middle of an inter-NHS funding gap"*. This has, in turn, brought into sharp focus questions of whether a contractual or some other right exists to levy service charges on the full recovery basis pursued by the Defendant and whether the services in respect of which such service charges are being demanded are of reasonable standard and are being provided at reasonable cost. All five actions in these proceedings engage, in various ways, these questions, either in this Trial 1 or in Trial 2.

<u>The parties</u>

42. Starting with the Defendant I have already explained, in general terms, the circumstances of its incorporation and its role in relation to that part of the NHS estate which it now owns and manages.

43. The description of the Claimants in the five actions is a rather more complicated task.

44. The Particulars of Claim in each action identified the Claimant (using the singular) as the relevant GP partnership and as the occupiers and tenants of the relevant premises. The relevant individuals comprising the Claimants in each action were not identified by name. In its Defence and Counterclaim in each action (now an Amended Defence and Counterclaim), the Defendant admitted that the Claimants (using the plural) in each action were the tenants of the relevant premises pursuant to the relevant tenancy, subject to the dispute, where it existed, over the nature of that tenancy. Prior to service of the Defence and Counterclaim in each action the Defendant served various requests for further information seeking (amongst other matters) the names of the individuals who were the current partners of the relevant partnership and Claimants in the relevant action. Each Defence and Counterclaim made reference to the further information

provided in response to those requests, as the basis for the Defendant's identification of the Claimants (and thus the tenants) in each action.

45. The consequence of this was that the parties arrived at a common identification of the Claimants/tenants in each action which was legally problematic. There were two reasons for this.

46. First, the composition of the partnerships has changed, and has continued to change, both before and after the commencement of the five actions. Leaving to one side the dissolution of the relevant partnerships which would, absent provision to the contrary, have been caused by changes in the identity of the partners, the relevant point in the present case is that a change in the composition of the partners in the relevant partnerships will not necessarily have changed the identity of the persons, whether partners or former partners, who are the tenants of the relevant premises and the Claimants in each action. Putting the matter another way, it is not necessarily the case that the persons who were the partners in the relevant practice at the commencement of these actions, and who were identified in the relevant statements of case as the Claimants in each action, were the same persons as those who were, and may remain tenants under the relevant tenancy.

47. Problems of this kind are normally dealt with, in the case of partnerships, by assignment of the relevant tenancy between outgoing and incoming partners. This ensures that existing partners in the relevant partnership (or four of them if the partners exceed four in number) are the tenants at law under the relevant tenancy. This also ensures that former partners do not find themselves inadvertently remaining as tenants under the relevant tenancy, with continuing liabilities under that tenancy (so far as such continuing liabilities can be avoided by assignment). In the present case there is no evidence of any such assignments having taken place. In theory, this has the consequence that the persons who are tenants under the relevant tenancy in each of the five actions are not, or at least may not be the same persons as those who were or are the current partners in the relevant partnership and have been named as Claimants in the actions on that basis. Nor is this problem easily managed by assuming a surrender and regrant of the relevant tenancy, on each occasion of a change in the composition of the relevant partnership. As the Defendant pointed out, the doctrine of implied surrender and regrant is not apt to apply to a situation where a tenancy is held by persons who are partners in partnership and the composition of the partners changes. In such a situation, and without more, one would expect the identity of the tenants to remain the same.

48. Second, in two of the five actions, the partners in the relevant partnership at the commencement of the relevant action numbered more than four. In these cases only four of the partners could have been tenants under the relevant tenancy, independent of the problem identified in my previous two paragraphs; see Section 34 of the Trustee Act 1925.

49. In order to manage these problems the parties were prepared to proceed on the basis of what was described by the Defendant as a convention, derived from the pleaded position in the five actions. The convention was expressed to be adopted

for the purposes of the five actions, and was expressed not to be binding on the parties for the future. The elements of this convention (**"the Convention"**) were as follows:

(1) The Claimants in each case, and the tenants under the relevant tenancy are the individuals identified as such in the statements of case.

(2) Where this results in more than four individuals being identified as Claimants and tenants in a particular action, four individuals are identified as the Claimants and tenants, as I explain further below.

(3) If and in so far as the Defendant is able to establish liability for arrears of service charges in any of the actions, the Defendant will not claim against any individual Claimant in respect of a period prior to the relevant Claimant joining the relevant partnership.

50. With some reluctance, given the dissonance between the Convention and basic principles of landlord and tenant law, I adopt the Convention for the purposes of this judgment. Applying the Convention, it becomes possible to identify the following individuals as the Claimants in each of the actions.

(1) In the case of Valley View Health Centre, the Claimants are Dr Janice Vernazza, Dr Pauline Taylor, and Dr Janet Bell, who were the partners in Valley View Health Centre at the commencement of this action. I should mention that Dr Janet Bell has since left the partnership.

(2) In the case of Coleford Family Doctors, the Claimants are Dr Barbara Cummins, Dr Elizabeth Williams, Dr Alvaro Leon, and Dr Katie Ramsey, who were the partners in Coleford Family Doctors at the commencement of this action.

(3) In the case of Bushbury Health Centre, the partners at the commencement of this action were Dr Clyde Luis, Dr Cyndylan Pillay, Dr Shahid Rafiq, Dr Amy Cox, Dr Daniel Nduwke, and Dr Mohammed Kazi. By the Convention the first four of these individuals are agreed to be the Claimants in the Bushbury action.

(4) In the case of St Andrews Medical Centre, the partners at the commencement of this action were Dr Peter Budden, Dr Andrew Fletcher, Dr Chioneso Mafunga, Dr Helen Sutherland, Dr Iain Tasker, Dr Thomas Regan, Dr Alison Walker, Dr Mawoneyi Mafunga, and Dr Craig Haddock. Dr Budden has since retired from the partnership. The Claimants are agreed to be Dr Sutherland, Dr Tasker, Dr Budden, and Dr Fletcher, on the basis that they are identified as the tenants of the relevant premises in a response, dated 25th March 2020, given to a request for further information made by the Defendant.

(5) In the case of St Keverne Health Centre, the Claimants are Dr Suzanne Atherton and Dr James Eckersley, who were partners in the St Keverne Health Centre at the commencement of this action. Dr Eckersley has since retired from the partnership.

51. There is scope for confusion, between the various set of Claimants and their premises, because each set of Claimants is identified by the name of the premises which they occupy. In the course of Trial 1 the expressions Valley View, Coleford, Bushbury, St Andrews, and St Keverne were used, interchangeably, to refer to the relevant action, the relevant Claimants, and the relevant premises. In order to avoid confusion, I will use the following definitions in this judgment.

(1) I will use the respective expressions Valley View, Coleford, Bushbury, St Andrews, and St Keverne to refer generally to each of the actions.

(2) I will, where it is important to make the distinction, refer to the Claimants in Valley View as the Valley View Claimants, and so on for the other actions. I will also however, where it is not so important to make the distinction, use the expression the Claimants to mean, as the context may require, all of the Claimants and/or a particular set of Claimants.

(3) I will use the expression the Valley View Partners to refer generally to those who have been partners in Valley View Health Centre at any particular time during the period of time with which I am concerned, and so on for the other actions.

(4) I will refer to the premises occupied by the Valley View Partners from time to time as the Valley View Premises, and so on for the other actions. It should be noted that, with the exception of the Valley View Premises and the St Keverne Premises, the various sets of premises have been, or may have been subject to some changes, in terms of their extent, over the relevant periods of time. My references are to the relevant premises as their extent has changed over time, where such change in extent has occurred.

(5) I will refer to all five sets of premises, collectively, as the Premises.

52. The use of these definitions requires some further elaboration and qualification, in two respects.

53. The first point relates to the identification of the partners from time to time, in respect of St Andrews. Dr Paul Budden was a St Andrews Partner, but retired from the partnership on 1st April 2021. Dr Budden gave evidence, which I accept, that the St Andrews Medical Centre was not run as a single partnership for much of its history, but as several different partnerships, all operating from the St Andrews Premises under the general umbrella of the St Andrews Medical Centre. Dr Budden explained that it was only relatively recently that the partnerships had merged into a single partnership. Unless however differentiation is required, it is convenient to use the expression the St Andrews Partners to mean the partners operating from the St Andrews Premises at any particular time, whether the legal position at the relevant time was that they were partners in different partnerships or in the now unified partnership.

54. The second point relates to changes in the extent of the relevant premises, which also requires some further elaboration. In theory, any such changes in the extent of the premises occupied by the relevant partners might have had an effect on the relevant tenancy; most obviously by working a surrender and regrant of the relevant tenancy, or possibly by excluding or including premises in the relevant tenancy which did not coincide with the areas actually occupied by the relevant partnership at a particular time. The parties were however content, for the purposes of these actions, for me to proceed on the basis that, with one exception, the premises demised by the relevant tenancy had, over the relevant period of time, been the same as the premises actually occupied by the relevant partnership at any particular time. The exception was St Andrews. I will explain this exception when I come to describe the St Andrews Premises.

The Valley View Premises

55. The Valley View Premises are contained within a building which was newly built in 2006 (**"the Valley View Building"**), comprising a two-storey purpose-built doctors' surgery. The Valley View Building is located at Goff Lane, Goff Oak, Hertfordshire EN7 5ET. The Valley View Building had and has the benefit of its own car parking area (**"the Valley View Car Park"**). The Valley View Premises themselves comprise parts of the ground and first floors of the Valley View Building.

56. The freehold interest in the Valley View Building and Valley View Car Park is vested in Broxbourne Borough Council. By a lease dated 6th January 2006 (**"the Valley View Headlease"**) the Council demised the Valley View Building and the Valley View Car Park to Jayant and Rashila Doshi, trading as AARJAY Investments (**"the Doshis"**), for a term of 125 years.

57. By an underlease dated 13th December 2006 (**"the Valley View Underlease"**) the Doshis underlet the Valley View Premises (the relevant parts of the ground and first floors of the Valley View Building) to the East and North Hertfordshire Primary Care Trust (**"the ENH PCT"**), for a term of 21 years from 13th December 2006. The Valley View Underlease is referred to as a headlease in a number of documents which I have seen, but it is correctly described as a underlease. It should also be noted that the expression *"the ENH PCT"* includes, where relevant, the Hertfordshire Primary Care Trust. I say this because a number of documents refer to the Hertfordshire Primary Care Trust as the landlord of the Valley View Partners in relation to the Valley View Premises.

58. By a further underlease dated 15th December 2009 (**"the Valley View Parking Underlease"**) the Doshis underlet ten car parking spaces within the Valley View Car Park (**"the Valley View Parking Spaces"**) to the ENH PCT for a term commencing on 1st August 2008 and (subject to a proviso for earlier determination in the event of earlier determination of the Valley View Underlease) expiring on 14th December 2027.

59. In or around early 2007, pursuant to an agreement between the parties that the Valley View Partners should take on the management and care of patients at the Valley View Premises, the Valley View Partners were permitted to take up occupation of the Valley View Premises by the ENH PCT. Dr Pauline Taylor is a Valley View Claimant and has been a Valley View Partner since the Valley View Partners took up occupation of the Valley View Premises. Dr. Taylor was a witness in Valley View and part of her evidence, which I accept, was that the Valley View Partners also occupied and made use of the Valley View Parking Spaces from the time when they took up occupation of the Valley View Premises.

60. At the time when they moved into the Valley View Premises the Valley View Partners (Dr Taylor and Dr Stone) were practising from premises on the first and second floors of a building known as the Cuffley Health Centre pursuant to a lease dated 12th September 2003 (**"the Cuffley Lease"**). The Cuffley Lease was granted by the South East Hertfordshire Primary Care Trust on 12th September 2003 to the Valley View Partners (Dr Davies, Dr Taylor, and Dr Stone) for a term of 15 years from and including 1st April 2002.

61. No formal document was ever entered into between the ENH PCT and the Valley View Partners, recording the terms upon which the Valley View Partners were permitted to occupy and use the Valley View Premises. In particular, no formal sub-underlease was ever granted. I will need to consider in more detail, later in this judgment, the circumstances in which this situation came about. For present purposes it is sufficient to record that the Valley View Partners have simply continued in occupation of the Valley View Premises and the Valley View Parking Spaces without the grant of any formal lease.

62. The parties are agreed that the legal consequence of this arrangement was that the Valley View Partners had and have a continuing tenancy of the Valley View Premises (**"the Valley View Tenancy"**). The dispute is over whether the Valley View Tenancy constitutes an implied quarterly periodic tenancy (the case of the Valley View Claimants) or a tenancy at will (the case of the Defendant). The dispute is also over the terms of the Valley View Tenancy.

63. Turning to the Valley View Parking Spaces I understood it also to be common ground between the parties that, by virtue of their use of the Valley View Parking Spaces, the Valley View Claimants also have a tenancy of the Valley View Parking Spaces. The nature and terms of this tenancy are not however in issue before me in the Valley View action.

64. The Defendant became the landlord in respect of the Valley View Tenancy on 1st April 2013, when the Valley View Underlease was vested in the Defendant by statutory transfer. For the sake of completeness I assume that the position would have been the same in respect of the tenancy, now held by the Valley View Claimants, of the Valley View Parking Spaces. I assume that the Defendant would have become the landlord in respect of that tenancy when the Valley View Parking Underlease was vested in the Defendant.

The Coleford Premises

65. The Coleford Premises are located within a single-storey building (**"the Coleford Building"**) with a car park, known as the Coleford Health Centre, Railway Drive, Coleford, Gloucestershire GL16 8RH. The Coleford Partners have occupied the Coleford Premises since 1990.

66. The Coleford Premises are said by the Defendant currently to comprise the areas shown coloured turquoise on the occupation plan attached to the Amended Defence and Counterclaim in Coleford. These areas comprise various parts of the Coleford Building. There is a dispute as to the extent of these areas, to which I will need to return later in this judgment. For present purposes it is sufficient to say that the Coleford Premises comprise a substantial part (using a deliberately neutral phrase) of the space in the Coleford Building. The remaining parts of the Coleford Building comprise common parts and areas occupied by other NHS entities.

67. There is and has been no written lease governing the occupation of the Coleford Partners. It is however common ground between the parties that the Coleford

Claimants have, on the basis of past conduct, an implied quarterly periodic tenancy (**"the Coleford Tenancy"**).

68. The Defendant became the landlord in respect of the Coleford Tenancy on 1st April 2013, when the freehold interest in the Coleford Premises, and in the remainder of the building and car park was vested in the Defendant by statutory transfer. This freehold interest was previously vested in the Gloucestershire Primary Care Trust (**"the GPCT"**).

The Bushbury Premises

69. The Bushbury Premises are located within a two-storey building (**"the Bushbury Building"**) located at Hellier Road, Bushbury, Wolverhampton WV10 8ED. The ground floor of the Bushbury Building comprises clinic space, with office space on the first floor. External to the Bushbury Building itself there are additional areas comprising a car park for patients and staff, external bin stores, and areas of hard and soft landscaping including some grassed areas.

70. The Bushbury Partners have occupied the Bushbury Premises pursuant to a written tenancy agreement made on 13th January 1994. The tenancy agreement was entered into between the Secretary of State, as landlord, and the four Bushbury Partners (assuming there were only four Bushbury Partners in 1994), as tenants. Clause 3 of this tenancy agreement described the tenancy as a tenancy at will. The parties are however agreed that the tenancy agreement created a quarterly periodic tenancy on the terms of the tenancy agreement (**"the Bushbury Tenancy"**).

71. The Bushbury Premises currently comprise the majority of the ground floor of the Bushbury Building and certain parts of the first floor. The relevant areas are, subject to one qualification, shown hatched red on the plans attached to the Amended Defence and Counterclaim in Bushbury. The qualification is that the Bushbury Premises do not include, on the first floor, a small rectangular area which is hatched red but comprises a storage cupboard, which I understand to comprise part of the common parts of the Bushbury Building.

72. The Defendant became the landlord in respect of the Bushbury Tenancy on 1st April 2013, when the freehold interest in the Bushbury Building was vested in the Defendant by statutory transfer. This freehold interest was previously vested in the Wolverhampton Primary Care Trust (**"the WPCT"**).

The St Andrews Premises

73. The St Andrews Premises are located within a two-storey building (**"the St Andrews Building"**) with a car park known as St Andrews Medical Centre, 30 Russell Street, Eccles, Salford, Manchester, Lancashire M30 0NU.

74. The St Andrews Partners originally designed and built the St Andrews Building, and occupied it as freehold owners. In 2004 the St Andrews Partners sold the St Andrews Building to the Salford Primary Care Trust (**"the SPCT"**) and took a leaseback of premises within the St Andrews Building. The lease in question (**"the 2004 St Andrews Lease"**) was granted by the SPCT to three of the St Andrews Partners on 10th March 2004 for a term of 15 years from and including

10th March 2004 at an initial rent of £83,000 per annum. The 2004 St Andrews Lease was contracted out of the protection of Part II of the Landlord and Tenant Act 1954 (**"the 1954 Act"**).

75. The 2004 St Andrews Lease expired on 9th March 2019. The St Andrews Partners continued in occupation of the St Andrews Premises. There were some initial negotiations over the grant of a new lease of the St Andrews Premises, but these negotiations did not progress and no new lease has been granted. It is common ground between the parties that the St Andrews Claimants are currently occupying the St Andrews Premises pursuant to a tenancy (**"the St Andrews Tenancy"**), by reason of the holding over after the expiration of the term of the 2004 St Andrews Lease. It is also common ground that the terms of the St Andrews Tenancy (save for the term) are the same terms as appear in the 2004 St Andrews Lease. The parties are in dispute as to whether this tenancy, resulting from the holding over, is an implied quarterly periodic tenancy (the case of the St Andrews Claimants) or a tenancy at will (the case of the Defendant).

76. The St Andrews Premises are said by the Defendant currently to comprise the areas shown coloured turquoise on the plans attached to the Amended Defence and Counterclaim in St Andrews. These areas comprise the bulk of the space on the ground and first floors of the St Andrews Building. There is a dispute in this respect, to which I will need to return later in this judgment. For present purposes it is sufficient to say that the St Andrews Premises comprise a substantial part (using a deliberately neutral phrase) of the space on the ground and first floors of the St Andrews Building.

77. I mentioned earlier an exception in relation to the agreement of the parties (for the purposes of the actions) that the extent of the demise in relation to each set of Premises corresponded to the area of the relevant building occupied by the relevant partners. In the case of St Andrews there was, until 9th March 2019, the 2004 St Andrews Lease, which defined the premises thereby demised (**"the St Andrews Demised Premises"**). So, in the case of St Andrews, the position of the Defendant, which I accept, is that the premises demised by the 2004 St Andrews Lease (the St Andrews Demised Premises) are as defined in the 2004 St Andrews Lease, rather than being defined by the extent of the occupation of the St Andrews Partners. The position after 9th March 2019 was less clear in the submissions, and I will need to come back to it later this judgment. For present purposes it is sufficient to say that my understanding of the Defendant's case was that the premises comprised in the St Andrews Tenancy were the same as the premises demised by the 2004 St Andrews Lease (the St Andrews Demised Premises). I also understood the position to be that the Claimants did not accept this case. The relevant point is that, as I understood the position, there was no consensus between the parties that the premises demised by the St Andrews Tenancy comprised the premises actually occupied by the St Andrews Partners since 9th March 2019. So, the consensus between the parties in relation to the other actions, namely that the extent of the premises demised by the relevant Tenancy corresponds to the extent of occupation of the relevant practice, does not apply to the 2004 St Andrews Lease or to the St Andrews Tenancy.

78. Notwithstanding this exception, the Defendant was prepared to make the following concession in relation to St Andrews. The alleged arrears of service charges in respect of St Andrews have been charged on an apportioned basis; that is to say by deriving a percentage figure for the apportionment from the proportion of the St Andrews Building said by the Defendant to have been occupied by the St Andrews Partners during the relevant service charge years; meaning the service charge years in respect of which the alleged arrears of service charges are claimed. The relevant areas are less than the St Andrews Demised Premises. As such, and on the Defendant's case, it can be said that the percentages used by the Defendant, assuming that they accurately reflect actual occupation of the St Andrews Partners during the relevant service charge years, are too low. The Defendant was however prepared, for the purposes of the St Andrews action, to restrict its claim for alleged arrears of service charge to the occupation based percentages which it had used for charging purposes. This concession was made in respect of the relevant service charge years only. The Defendant reserved its position for the future.

79. What this means is that it is more than usually important to keep in mind, when I refer to the St Andrews Premises in this judgment, that I am referring to the premises from time to time occupied by the St Andrews Partners. It should be kept in mind that, while the 2004 St Andrews Lease was in existence, the St Andrews Premises have been, or may have been, at certain times, less than the St Andrews Demised Premises (the premises actually demised by the 2004 St Andrews Lease). It should also be kept in mind that, as I understood the Defendant's case, the same distinction applies to the period after the expiration of the 2004 St Andrews Lease. As from 9th March 2019, the St Andrews Premises (the premises occupied from time to time by the St Andrews Partners) may have been less than the premises demised by the St Andrews Tenancy.

80. Finally, in relation to the St Andrews Premises, the Defendant became the landlord of the St Andrews Partners on 1st April 2013, when the freehold interest in the St Andrews Building was vested in the Defendant by statutory transfer. This freehold interest was previously vested in the SPCT.

The St Keverne Premises

81. The St Keverne Premises are located in a single-storey purpose-built surgery (**"the St Keverne Building"**), with a car park and associated landscaped areas, and known as Polventon Parc, St Keverne, Helston, Cornwall TR12 6PB. The St Keverne Partners have occupied the St Keverne Premises since the late 1970s.

82. There is some evidence of the grant of historic licences in respect of the St Keverne Building, but it is not suggested that any of these licences continued into the period with which this dispute is concerned. It is common ground between the parties that the St Keverne Claimants occupy the St Keverne Premises pursuant to an implied quarterly periodic tenancy (**"the St Keverne Tenancy"**), inferred from past conduct. The St Keverne Premises currently comprise the entirety of the St Keverne Building.

83. The Defendant became the landlord of the St Keverne Partners on 1st April 2013, when the freehold interest in the St Keverne Building was vested in the Defendant

by statutory transfer. This freehold interest was previously vested in the Cornwall and Isles of Scilly Primary Care Trust (**"the CIS PCT"**).

The actions

84. Each of the five actions was commenced by claim form issued on 15th January 2020. In the Particulars of Claim in each action the relevant Claimants sought a series of declarations (**"the Charging Policy Declarations"**), in the following terms (taken from the Particulars of Claim in Valley View):

> *"1. The terms of the tenancy do not include the provisions of the Defendant's Consolidated Charging Policy 2016/17 or 2017/18.*
>
> *2. There is no implied term of the tenancy that the Claimant should pay charges in accordance with the Defendant's Consolidated Charging Policy 2016/17 or 2017/18*
>
> *3. There is no agreement between the Claimant and Defendant to vary the terms of the tenancy by the provisions of the Defendant's Consolidated Charging Policy 2016/17 or 2017/18.*
>
> *4. The terms of the tenancy have not been varied by the provision of the Defendant's Consolidated Charging Policy 2016/17 or 2017/18.*
>
> *5. The provisions of the Defendant's Consolidated Charging Policy 2016/17 or 2017/18 are not incorporated into the tenancy."*

85. As can be seen, the overall purpose of the Charging Policy Declarations was to establish that the Charging Policies do not form any part of the terms of the various tenancies (together **"the Tenancies"**) pursuant to which the Claimants occupy their respective premises.

86. By what are now Amended Defences and Counterclaims in the five actions, the Defendant has admitted that the Charging Policies have not been incorporated into any of the tenancies held by the Claimants, but has made it clear that it relies upon the Charging Policies as giving notification to the Claimants and their predecessor partners that they would be required to pay the service charges in respect of the items which form the basis of the counterclaims for alleged arrears of service charges. By way of illustration, paragraph 42 of the Amended Defence and Counterclaim in Valley View is in the following terms:

> *"42. As to paragraph 14:*
>
> *42.1 The Charging Policies are relied upon, in company with other communications set out in Schedule 2 hereto, in support of the Defendant's contention that it has at all times been made clear to the Claimants that they would be required to pay service charges, in respect of the costs referred to in paragraph 18.2 above, if and for so long as the Claimants remained in occupation of the Premises.*
>
> *42.2 But the Defendant does not contend that any of its Charging Policies have impliedly retrospectively varied the Claimants' existing service charge obligations and the Defendant does not contend that the relevant service charges are due pursuant to the Charging Policies (as opposed to the Claimants' tenancy at will), as the Defendant has already explained to the Claimants in a*

> *letter dated 6 August 2019 from the Defendant's solicitors to the Claimants' solicitors. The relevant service charges are instead due under the terms of the Claimants' tenancy at will."*

87. Each of the Amended Defences and Counterclaims contains a counterclaim for alleged arrears of service charge. The counterclaimed sums vary in their amount but, as I have already noted, add up to a substantial sum. The Claimants have responded to the Amended Defences and Counterclaim by Replies and Defences to Counterclaim. The claims for alleged arrears of service charge are resisted by the Claimants on a number of grounds. I set out in the following sections of this judgment those grounds which fall to be determined in Trial 1. Each of the Amended Defences and Counterclaims also contains claims for declaratory relief in respect of (i) the nature of the tenancies currently existing in respect of Valley View and St Andrews, (ii) the extent of the relevant premises demised by the relevant tenancy (with the exception of Valley View), (iii) the obligations and rights of the parties in relation to service charges under the relevant tenancy, and (iv) the liabilities of the Claimants for the alleged arrears of service charges.

88. These five actions are not isolated cases. One of the Defendant's witnesses was Mark Smith, the Chief Financial Officer of the Defendant. His evidence was that the Defendant's book of GP service charge debt was approximately £175 million as at the end of October 2021, with this figure set to rise by between £20 million and £30 million a year. These figures are of course the Defendant's figures for alleged arrears of service charges, on the Defendant's case. They are not admitted or agreed figures. I mention them simply in order to provide some further context for the dispute over the service charges in the present actions.

89. I have already explained my decision, at the pre-trial review, to split the issues in the five actions between Trial 1 and Trial 2. The only other event, in terms of the history of the proceedings, which requires specific mention is that the Claimants did make applications for judgment on admissions in respect of their claims to the Charging Policy Declarations. That application came before Chief Master Marsh on 17th November 2020. For the reasons set out in a judgment delivered on 4th December 2020, under neutral citation [2020] EWHC 3395 (Ch), the Chief Master dismissed the application. It will be necessary to return to this judgment (**"the 2020 Judgment"**) when I come to consider the claim for the Charging Policy Declarations.

<u>The issues in Trial 1 - common issues</u>

90. The principal common issue between the five actions is whether the Charging Policy Declarations should be made. The Claimants say that they should be made. The Defendant says that they should not. The agreed list of issues for Trial 1 lists this issue separately for each set of Premises, but I do not think that there is any reason to consider the issue separately for each set of Premises.

91. Beyond this common issue, and although there are areas of overlap in relation to the remaining issues in Trial 1, the remaining issues are best set out by reference to the individual actions. It is however helpful, under the heading of common

issues and by way of introduction to the issues in the individual actions, to explain how certain of the issues now stand. The relevant issues are as follows:

(1) The disputes over the rights and obligations of the parties, so far as the provision of services and the payment of service charges are concerned.
(2) The disputes over the extent of premises demised by certain of the Tenancies, and the related disputes over the extent of occupation of certain of the Premises.
(3) The alternative counterclaims of the Defendant for the alleged arrears of service charges, on the basis of implied contract, restitution (unjust enrichment, and estoppel.
(4) The dispute over the recoverability of professional fees.

92. Starting with the rights and obligations of the parties in relation to service charges, there is, attached to each of the Amended Defences and Counterclaims, a schedule which sets out a list of services (i) which, on the Defendant's case, the Defendant is obliged or entitled to provide and (ii) in respect of which, on the Defendant's case, the relevant Claimants are required to pay a service charge. This schedule has then been carried over, in an updated form, to the Defendant's specific skeleton argument for each of the five actions. The Claimants, on their side, have attached a schedule to each of their specific skeleton arguments for each of the five actions, which is helpfully colour coded, and sets out the Claimants' case on individual items of the services. This case is set out subject to other defences which the Claimants have to the claims for alleged arrears of service charges, both in Trial 1 and Trial 2. Subject to these other defences, four colours are used in the Claimants' schedules, as follows:

(1) Green indicates that it is accepted that the relevant service was provided and that the Defendant is, in principle, entitled to be recompensed for the cost of the relevant service under the relevant tenancy.
(2) Amber indicates that it is not accepted that the relevant service was provided, but that it is accepted that, if the service had been provided, the Defendant would, in principle, be entitled to be recompensed for the cost of the relevant service under the relevant tenancy.
(3) Purple indicates that it is accepted that the relevant service was provided, but that it is denied that the cost of the service is recoverable under the relevant tenancy.
(4) Red indicates that it is not accepted that the relevant service was provided but that it is denied that the cost of the service would have been recoverable under the relevant tenancy, if the relevant service had been provided.

93. There were two problems with the rival schedules mentioned in my previous paragraph. First, the schedules did not, in themselves, identify what the cases of the parties were on the actual terms of the service charge obligations (if any) in each of the Tenancies. Second, the content of the schedules was not, on the Defendant's side, necessarily exhaustive. The Defendant's case did not rule out the possibility of other services being provided in the future, in respect of which it might be said that the Claimants had to pay service charges. This had the consequence that while the schedules were helpful in isolating the items of services which were in dispute, a decision on those items will not necessarily provide a final settlement of the questions, subject to the Claimant's other defences, of what (if any) services the Defendant is obliged or entitled to provide

pursuant to the Tenancies or what (if any) services the Claimants have to pay for pursuant to the Tenancies.

94. The first of the above problems was partially solved by the parties producing, in the course of the trial, draft orders for each action, which set out the terms of the relief sought by the respective parties. The second of the above problems was not resolved by the draft orders. It follows that when I set out the issues concerning individual items of services in each action, I am setting out issues which are not necessarily exhaustively stated.

95. Turning to the disputes over extent of demised premises and occupation, I have already noted that, with the exception of Valley View, the Defendant counterclaims for declarations as to the extent of the relevant premises demised by the relevant tenancy. The counterclaims for these declarations were pursued in Trial 1. The agreed list of issues for Trial 1 did not in fact identify any issue in this respect, possibly because it was thought that there were no issues in this respect, prior to the start of the trial. This however turned out not to be the case. Issues did arise, which need to be resolved, in relation to Coleford and St Andrews. I am in no doubt that I should, in this judgment, resolve the issues which have arisen in this context.

96. The agreed list of issues for Trial 1 also included, in all cases but Valley View, the question of the proportion of the relevant building occupied by the relevant partners during the service charge years to which the relevant counterclaim related. This matters, because, as I have already noted in relation to St Andrews, this proportion, whatever the correct figure may be, is used by the Defendant as the basis for a percentage apportionment of the services charges payable, or said to be payable in respect of the relevant building.

97. In each of the four cases (excluding Valley View) the extent of what was referred to as current occupation was pleaded in the relevant Amended Defence and Counterclaim by reference to a plan or plans attached to the relevant Amended Defence and Counterclaim. These plans, in so far as they showed this current occupation, were the subject of admissions in the Replies and Defences to Counterclaim served by the Claimants. As matters stood by the conclusion of the hearing of Trial 1, the position had become somewhat confused. Doing my best to disentangle the issues on the extent of demised premises and the extent of current and past occupation, the position which had been reached at the conclusion of closing submissions, as I have understood it, was as follows.

98. I start with the counterclaims for declarations as to the extent of the relevant premises demised by the relevant Tenancy.
    (1) In relation to these declarations, the issue which was engaged, subject to one exception, was the extent of current occupation of the relevant premises by the relevant practice. This was because, as I have already noted, the parties were agreed that the extent of the premises demised by the relevant Tenancy in each case comprised the same premises as were occupied by the relevant practice. There is an exception for St Andrews in this context, as I have explained, because the agreement between the parties to which I have referred did not apply to St Andrews.

(2) The expression current occupation has to be treated with some care. The counterclaims for declarations as to the extent of the relevant demised premises were, with the exception of St Andrews, pursued on the basis of what was, at the time of the counterclaims, said by the Defendant to be the extent of the current occupation by the relevant practice. It follows that current occupation, in this context, means occupation as it stood at the time when the Defendant pleaded its counterclaims for declarations as to the extent of the demised premises, and/or at the time when the Claimants admitted the extent of the relevant occupation. I leave open the identification of a precise date for such occupation, if such precise date is required or appropriate.

(3) In theory, and with the exception of St Andrews, the making of these declarations should not be controversial because, in the remaining three cases, the extent of current occupation, as pleaded in the relevant Amended Defences and Counterclaims and as shown on the attached plans, has been admitted by the Claimants.

(4) This held true in the case of St Keverne. In St Keverne my understanding is that there was no objection to a declaration being made as the extent of the premises currently demised by the relevant tenancy on the basis of the admitted position on the statements of case, subject to such declaration being tied to an appropriate date which reflects the timing of the admission.

(5) In Coleford, Bushbury, and St Andrews life turned out not to be so simple. As part of their closing submissions, the Claimants produced a Closing Note on Occupancy. Attached to this Note were some plans, which were introduced in paragraph 5 of the Note in the following terms:

> *"C does not wish to appear unhelpful in not being able to assist the court with the occupancy percentages (position set out below), however, since the close of the hearing further instructions have been taken from Coleford, Bushbury and St Andrews and has produced the plans attached to this note which show the current areas occupied by those practices. Those plans are Cs' suggested answer to court if it is minded to grant relief D sought in its pleading."*

(6) These plans, when scrutinised, did not coincide with the equivalent plans showing current occupation in the Amended Defences and Counterclaims in Coleford, Bushbury, and St Andrews. The extent of current occupation shown in the plans attached to the relevant Amended Defences and Counterclaims was admitted by the Claimants.

(7) In Bushbury the discrepancy should not be material because, so far as I can see, the Claimants' plans simply removed a small first floor storage area from the premises shown as occupied by the Bushbury Partners. I understood the Defendant to accept that this revision should be made. Accordingly my understanding is that, in Bushbury, there is no objection to a declaration being made as to the extent of the premises currently demised by the Bushbury Tenancy on the basis of the admitted position on the statements of case, subject (i) to such declaration being tied to an appropriate date which reflects the timing of the admission, and (ii) correction of the Defendant's plans so as to remove the first floor storage area from the premises shown as occupied by the Bushbury Partners.

(8) In Coleford my understanding, from the Claimant's Closing Note on Occupancy, was that the Claimants did object to a declaration being made,

in the terms sought by the Defendant, as to the extent of the premises currently demised by the Coleford Tenancy. This, as it seems to me, would require the grant of permission to the Claimants to withdraw their admission in this respect. I understood that the Claimants did not object, in principle, to a declaration being made. I understood their case to be that the declaration should be tied to the area shown as occupied on the plan attached to their Note, rather than the area shown as occupied on the Defendant's plan.

(9) In relation to St Andrews I understood the Claimants' position to be that the extent of the premises demised by the St Andrews Tenancy corresponded to the extent of the occupation of the St Andrews Partners, as such occupation was shown on the plans attached to their Note. Again, this would require the grant of permission to the Claimants to withdraw their admission of current occupation in this respect. In the course of closing submissions the Claimants did make an application for permission to withdraw their admission of current occupation in St Andrews. It was not clear whether the application also extended to Coleford, although it seems to me that a similar application was, as I have said, required in Coleford. In the case of St Andrews however it has to be kept in mind that the argument over the extent of the premises demised by the St Andrews Tenancy was not confined to an argument over the extent of the occupation of the St Andrews Partners. As I have said, the Defendant's case, as I understood it, was that the premises actually demised by the St Andrews Tenancy were the same as the premises demised by the 2004 St Andrews Lease; that is to say the premises I am referring to as the St Andrews Demised Premises. If the Defendant is right about this, the extent of actual occupation by the St Andrews Partners is irrelevant to the question of the extent of the premises demised by the St Andrews Tenancy.

99. Turning to what I will call historic occupation, that is to say the extent of occupation of the relevant practice during the relevant service charge years, I do not need to be so laborious:

(1) In relation to St Keverne the extent of historic occupation is not in issue. It is common ground that the St Keverne Partners have occupied the whole of the St Keverne Building during the relevant service charge years.

(2) In relation to Coleford, Bushbury, and St Andrews, the extent of historic occupation is in issue.

(3) The Defendant was at some pains to emphasize that it had not actually counterclaimed for declaratory relief as to historic occupation. I understood its position to be that a determination was required as to historic occupation, and that it was for that reason that the issue of historic occupation appeared on the agreed list of issues. I am doubtful that this point matters. Given that historic occupation is in issue, it is plainly sensible that my decisions in this respect are recorded in formal declarations of the court. Where however I refer to the Defendant claiming declarations as to historic occupation, such references should be read subject to the point that there were no formal counterclaims for such relief.

100. I come next to the Defendant's alternative claims in reliance upon implied contract, restitution (unjust enrichment), and estoppel. In the Amended Counterclaims the Defendant's primary case is that the alleged arrears of service charges are due under the terms of the relevant Tenancies. As a fallback position, the Defendant counterclaimed for the alleged arrears on the basis that, if and in so far as the sums claimed were not due under the Tenancies, the Defendant was entitled to be paid the reasonable costs of the relevant services on the basis of implied contract and/or restitution (unjust enrichment) and/or estoppel. In closing submissions, and for the reasons which it explained, the Defendant did not pursue these alternative claims in St Andrews, and did not press these alternative claims in Valley View, Coleford, and St Keverne. In Bushbury the Defendant continued to pursue the claim in restitution, so far as the costs of services might be found to be irrecoverable under the terms of the Bushbury Tenancy. The net effect of all this was that the Defendant's alternative claims now only arise in relation to Bushbury and, in relation to Bushbury, only in the context of the claim to restitution based upon unjust enrichment.

101. I come finally to professional fees. One item of services which is in dispute between the parties is professional fees. It may not be apt to describe professional fees as an item of services. The Defendant was at pains to stress that professional fees were simply part of the cost of providing particular services, in those cases where professional fees were legitimately and reasonably incurred in providing a particular item of services. For present purposes however, the relevant point is that the Defendant's submission was that it was not appropriate to make a decision on the recoverability of professional fees in Trial 1. The Defendant's argument was that claims for professional fees fell to be considered in Trial 2, with each such claim considered separately. The Defendant's case was that it was not feasible to decide, in principle, whether professional fees were recoverable. What had to be decided was whether each particular claim for professional fees was properly and reasonably made, as part of the cost of providing a particular item or particular items of services. This, so the Defendant contended, was a task for Trial 2, with each claim for professional fees to be subjected to separate scrutiny, if and in so far as disputed.

102. I was, initially, of the view that a decision on the in principle recoverability of professional fees could usefully be made, and should be made in Trial 1. I did not however understand the Claimants to be arguing that I should make a decision on in principle recoverability in Trial 1. In these circumstances, I was eventually persuaded that I should accept the Defendant's argument, and that decisions on the recoverability of professional fees, where claimed as part of the alleged arrears of service charges, should be left to Trial 2. In these circumstances I do not deal with the recoverability of items of professional fees in this judgment.

103. Finally, and before leaving common issues, I should make it clear that I will deal with the question of whether the Charging Policy Declarations should be made after I have dealt with the issues in the individual actions. In my view the arguments concerning the claims for the Charging Policy Declarations are best considered after I have seen where I have got to on the issues in the individual actions.

The issues in Trial 1 – Valley View

104. The specific issues in Valley View, as they stood at the conclusion of the hearing in Trial 1, are as follows:
    (1) Is the Valley View Tenancy a tenancy at will or an implied quarterly periodic tenancy?
    (2) Is the Defendant obliged to continue to provide services under the Valley View Tenancy and, if so, which of the services referred to in Amended Schedule 1 to the Valley View Amended Defence and Counterclaim?
    (3) Is the rent payable under the Valley View Tenancy an all-inclusive rent (including any service charges payable) of £27,375 per quarter, or does the Valley View Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant (in addition to the rent) and, if so, on what basis and for which services?
    (4) If and to the extent that the Valley View Claimants are liable to pay for services pursuant to the Valley View Tenancy, are the Valley View Claimants liable, in principle, to pay management costs associated with the provision of those services?

105. So far as management costs, or management fees are concerned, it should be noted that the claim for management costs is confined to the last three of the service charge years with which the actions or some of them are concerned; that is to say the 2017/2018, 2018/2019, and 2019/2020 service charge years. This applies both in Valley View and in the other actions.

106. So far as issue (3) above is concerned, and if the rent is not all inclusive, there are no items of services in dispute, save for the separate dispute over the recoverability of management costs.

The issues in Trial 1 – Coleford

107. The specific issues in Coleford, as they stood at the conclusion of the hearing in Trial 1, are as follows:
    (1) Is the Defendant obliged to continue to provide services under the Coleford Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the Coleford Amended Defence and Counterclaim?
    (2) Does the Coleford Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant and, if so, on what basis and for which services?
    (3) Is the obligation to pay a service charge under the terms of the Coleford Tenancy, so far as such obligation exists, subject to a cap and, if so, what is the nature of the cap?
    (4) If and to the extent that the Coleford Claimants are liable to pay for services pursuant to the Coleford Tenancy, are the Coleford Claimants liable, in principle, to pay management costs associated with the provision of those services?
    (5) Is the counterclaim for alleged arrears of service charge due in respect of the service charge year 2013/2014 statute barred?
    (6) What is the current extent of the premises demised by the Coleford Tenancy?

(7) What proportion of the Coleford Building have the Coleford Partners occupied in each of the service charge years to which the counterclaim relates?

108. So far as issue (2) above is concerned, the items of services in dispute reduced, in the course of Trial 1, to four. They are (i) clinical supplies, (ii) feminine hygiene, (iii) insurance, and (iv) security services/planned contract security. These items are of course additional to the dispute over the recoverability of management costs. In the case of insurance it is convenient to mention at this point that the Defendant's claim to recover the cost of insurance is restricted to the cost of buildings insurance, both in Coleford and in the other actions where the cost of insurance is claimed as part of the service charge said to be payable.

109. The reference to a cap, at issue (3) above, requires some further explanation. The Coleford Claimants contend that the obligation to pay a service charge, so far as such obligation exists, is subject to a cap (**"the Coleford Cap"**). The Coleford Cap is pleaded, in paragraph 15 of the Coleford Particulars of Claim as an annual limit on the service charge of £14,038.17, which was the sum said to have been paid by the Coleford Partners, by way of non-reimbursable service charge, for 2012/2013. Paragraph 5.c.iv of the Coleford Reply and Defence to Counterclaim then pleads that it was a term of the Coleford Tenancy that the charges payable were to rise only in line with inflation. In closing submissions the Coleford Cap was identified by the Claimants as a cap of no more than £14,038.14 per year, based on 2012/2013 as the last year in what was referred to as *"the PCT era billing cycle"*, rising only in line with inflation and increased occupancy.

<u>The issues in Trial 1 – Bushbury</u>

110. The specific issues in Bushbury, as they stood at the conclusion of the hearing in Trial 1, are as follows:
    (1) Is the Defendant obliged to continue to provide services under the Bushbury Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the Bushbury Amended Defence and Counterclaim?
    (2) On the true construction of the terms of the Bushbury Tenancy, for which services do the Bushbury Claimants have to pay service charges?
    (3) If and to the extent that the Bushbury Tenancy does not impose a legal obligation to contribute towards the Defendant's costs incurred in providing services, does the Defendant have the right, in principle, to recover a contribution from the Bushbury Claimants towards the cost of providing services applying principles of restitution?
    (4) If and to the extent that the Bushbury Claimants are liable to pay for services, either pursuant to the Bushbury Tenancy or applying principles of restitution, are the Bushbury Claimants liable, in principle, to pay management costs associated with the provision of those services?
    (5) Is the counterclaim for alleged arrears of service charge due in respect of the service charge year 2013/2014 statute barred?
    (6) What is the current extent of the premises demised by the Bushbury Tenancy?
    (7) What proportion of the Bushbury Building have the Bushbury Partners occupied in each of the service charge years to which the counterclaim relates?

111. So far as issue (1) above is concerned, it is now agreed between the parties that the Defendant is under no obligation to provide any services pursuant to the terms of the Bushbury Tenancy. The Defendant does however seek a declaration to record this position.

112. So far as issue (2) above is concerned, there were five items of services in dispute, additional to the dispute over the recoverability of management costs. They are (i) grounds and garden maintenance/planned contract maintenance, (ii) grounds and garden maintenance (reactive), (iii) insurance, (iv) professional fees, and (v) snow clearing and gritting (planned). Professional fees are now for Trial 2.

113. So far as Issue (6) is concerned my understanding was, as I have already noted, that there was in fact agreement between the parties as to the extent of the premises demised by the Bushbury Tenancy. A declaration was however sought to record this position.

The issues in Trial 1 – St Andrews

114. The specific issues in St Andrews, as they stood at the conclusion of the hearing in Trial 1, are as follows:
    (1) Is the St Andrews Tenancy a tenancy at will or an implied periodic quarterly tenancy?
    (2) Is the Defendant obliged to continue to provide services under the St Andrews Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the St Andrews Amended Defence and Counterclaim?
    (3) On the true construction of the terms of the St Andrews Tenancy, for which services do the St Andrews Claimants have to pay service charges?
    (4) If and to the extent that the St Andrews Claimants are liable to pay for services pursuant to the St Andrews Tenancy, are the St Andrews Claimants liable, in principle, to pay management costs associated with the provision of those services?
    (5) What is the current extent of the premises demised by the St Andrews Tenancy?
    (6) What proportion of the St Andrews Building have the St Andrews Partners occupied in each of the service charge years to which the counterclaim relates?

115. While I have listed issue (2) as an issue, there is no dispute to resolve. The parties are agreed that, under the terms of the St Andrews Tenancy, the only service which the landlord is required to continue to provide is compliance with the landlord's repairing obligation in clause 5.3 of the 2004 St Andrews Lease. The parties are agreed that this obligation is also contained in the St Andrews Tenancy. So far as issue (3) above is concerned, there are no items of services in dispute, save for professional fees, and the separate dispute over the recoverability of management costs. Professional fees are now for Trial 2.

The issues in Trial 1 – St Keverne

116. The specific issues in St Keverne, as they stood at the conclusion of the hearing in Trial 1, are as follows:

(1) Is the Defendant obliged to continue to provide services under the St Keverne Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the St Keverne Amended Defendant and Counterclaim?
(2) Is the rent payable under the St Keverne Tenancy an all-inclusive rent (including any service charges payable) of £6,742 per quarter, or does the St Keverne Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant (in addition to the rent) and, if so, on what basis and for which services?
(3) If and to the extent that the St Keverne Claimants are liable to pay for services pursuant to the St Keverne Tenancy, are the St Keverne Claimants liable, in principle, to pay management costs associated with the provision of those services?
(4) What is the current extent of the premises demised by the St Keverne Tenancy?
(5) What proportion of the St Keverne Building have the St Keverne Partners occupied in each of the service charge years to which the counterclaim relates?

117. So far as issues (4) and (5) above are concerned there was, as I have already noted, agreement between the parties that the premises demised by the St Keverne Tenancy comprise all of the St Keverne Building, and that the St Keverne Partners have occupied all of the St Keverne Building during the relevant service charge years. The Defendant does however seek declarations to record this position.

The evidence

118. I heard or received evidence from a large number of witnesses. Some witnesses gave what was referred to as contextual evidence; meaning evidence which was not specific to any of the actions. In some cases, principally on the Defendant's side, witnesses made a second responsive witness statement, dealing with matters raised in the first round of witness statements. The majority of the witnesses gave evidence specific to one action. A few witnesses gave their evidence remotely. In other cases I read the relevant witness statement, either because the relevant evidence was unchallenged (for the purposes of Trial 1) or because the witness was unable to give oral evidence. In the latter case the parties were agreed that I could read the relevant witness statement, subject to questions regarding the weight to be given to that evidence, in the absence of oral evidence and cross examination.

119. In terms of my assessment of the witnesses I have attached an appendix to this judgment. In that appendix I have set out a brief general assessment of each witness who gave oral evidence, and I have listed those other witnesses, called by the parties, whose evidence I have read. I have placed the assessment and the list in an appendix in order to avoid this section of the judgment becoming unmanageably long. I do however have the following general comments on the evidence of the witnesses.

120. First, I do not think that this is a case where my assessment of the witnesses and their evidence is central to much of what I have to decide. This is not a case where any of the issues seem to me to turn on a critical conflict of factual

evidence; such as who said what in a vital conversation. Nor is it a case where detailed findings of fact are required.

121. Second, there are plenty of documents available, from which the relevant history in each action can be reconstructed, and against which the oral evidence can be tested.

122. Third, the witness statements were all, as I understood the position, drafted prior to the pre-trial review, and my order for a split trial (even where formally served after that date). This had the consequence that many of the witness statements contained detailed, and possibly more contentious evidence on the Trial 2 issues. The result was that some of the witnesses did not have much relevant evidence to give. The relevant evidence which was given was less detailed and, as a general rule and for that reason, less contentious.

123. Fourth, I found all the witnesses who gave evidence to be honest witnesses who were, as a general rule, doing their best to assist the court with their recollection of the matters they were asked about. Some witnesses were, at times, defensive in their evidence. Some witnesses were, at times, clearly concerned to defend the position of the party on behalf of whom they were giving evidence, and allowed that concern to affect their evidence. I stress however that these are minor criticisms. The importance of these five actions to the parties, and to the BMA, as the party supporting the Claimants, was obvious. It was understandable that this resulted in some defensiveness and some partisanship in some of the evidence.

124. Fifth and finally, the content of the appendix has been prepared for the purposes of my findings in this Trial 1. The same applies to specific discussion of the evidence of a witness in this judgment. My assessment of the witnesses might, conceivably, also have some relevance in Trial 2, but that is as far as my assessment goes. In future dealings between the Defendant, the BMA, and GP practices, the content of the appendix, and specific comments on the witness evidence in this judgment are not intended to be available as a stick to beat any witness in this trial, on either side of the dispute.

125. There is one other important point on the evidence. As I have indicated, I heard the evidence of a large number of witnesses. In addition to this, the documents in the five actions are voluminous, and have been the subject of extensive reference. It is inevitable, given the quantity of oral and written evidence, that it is not possible to make specific reference to all of the evidence which I received and heard, and which featured in the submissions. It has all been taken into account, whether or not the subject of specific reference in this judgment. It is also convenient to mention, in this context, that the same applies to the extensive, and helpful written and oral submissions which I received in the course of Trial 1.

<u>The Claimants' Note on Premises Costs Directions and Subsidies</u>

126. Before I embark on my discussion of the individual issues in the five actions, there is an important matter which I should deal with at this stage. As I have already noted, the Claimants produced, as part of their written submissions for

Trial 1, a Note on Premises Costs Directions and "Subsidies" (the quotation marks were added by the Claimants). In an earlier section of this judgment, where I have dealt with the context of this dispute, I have identified the shortfall which existed between the service charge expenditure incurred by the PCTs and the level of recovery of that service charge expenditure from GP practices. As a general rule, it appears that the PCTs were prepared to fund that shortfall.

127. The purpose of the Claimants' Note was to contradict the Defendant's characterisation of the PCTs' funding of this shortfall as a subsidy. The Claimants' Note, as I understood it, made the following principal points:
    (1) Any such shortfall which the PCTs incurred in relation to the provision of services was incurred by the PCTs in their role as landlords, not in their role as commissioners of the services of the GPs.
    (2) The PCTs consciously chose to take on the obligation of providing services and maintaining premises at their own cost, including their own management costs, and did so by agreement with GPs.
    (3) The burden of these arrangements transferred to the Defendant, as part of the statutory transfer of obligations to the Defendant when the relevant part of the NHS estate was vested in the Defendant.
    (4) The Defendant is only entitled to charge what was historically agreed, whether that allows it to recover full costs or not.
    (5) The PCTs chose to use the money in their budgets to meet part or, in some cases, all of the costs of running and maintaining their properties. The PCTs agreed with their tenants to take on the obligations of meeting these costs in its estates management and landlord function, and such agreements form part of the terms of the tenancies held by GP practices.

128. The Note concludes, at paragraph 17, in the following terms:
    "Cs have found themselves in the middle of an inter-NHS funding gap – but any budget cuts or restructuring within and between NHS bodies that D has faced does not alter the terms of the binding tenancies with Cs (and GPs nationally)."

129. It is, in my view, necessary to be very careful in dealing with the arguments in this Note. I agree with the Claimants, indeed I understand this not to be in dispute, that the Defendant has, by virtue of the statutory transfer, inherited the obligations of the PCTs in their capacity as landlords of premises occupied by GP practices. I also agree with the Claimants that, in a particular case, there may have been an agreement reached between the relevant PCT and the relevant GP practice which had the legal consequence that the ability of the PCT to recover its service charge expenditure on the relevant set of premises was limited in some way. This legal consequence might be because the relevant agreement is incorporated into the terms of the relevant tenancy, or it might be by some other legal route. All other things being equal, one would expect the Defendant to have inherited the burden of that legal consequence by reason of the terms of the statutory transfer.

130. That however is as far as my agreement with the Note goes. If and in so far as the Note submitted that the Defendant has inherited some general obligation or burden from the PCTs which operates to limit its service charge recovery, I reject that submission. There was no evidence which I received or heard which, in my

judgment, came anywhere near supporting such a submission. It would be remarkable if, over hundreds of properties involving different PCTs and different GP practices, any such uniform legal position could be said to have been achieved.

131. In summary, the question of whether the ability of the Defendant to recover its full service charge expenditure on any particular set of GP premises is limited in any way can only be answered on a case by case basis, by reference to the facts and arguments in each particular case. If and in so far as an *"inter-NHS funding gap"* exists, the existence of that gap does not, without considerably more, have any effect on the private law rights and obligations existing between the Defendant and any particular GP practice.

Valley View – relevant history

132. As I have already noted, in 2006 the Valley View Partners (Dr Taylor and Dr Stone) were practising from premises on the first and second floors of a building known as the Cuffley Health Centre pursuant to the Cuffley Lease, the term of which ran for 15 years from and including 1st April 2002. The Cuffley Lease was granted in 2003, but the Valley View Partners had been practising from the Cuffley Health Centre for some years to prior to 2003.

133. The Cuffley Lease was granted at a rent of £31,500 per annum, subject to a three yearly rent review pattern. The Cuffley Lease also contained provisions for the payment of a service charge amounting to two thirds of the Service Costs, as that expression was defined in the Cuffley Lease (clause 2.2 and Part III of the Third Schedule). There were also tenant's repairing and decorating covenants (clauses 3.4 and 3.5), and a covenant to pay a due proportion of rates and other outgoings to the landlord, and to pay for utilities (clause 3.2). There was also a break clause, at clause 5.9, which permitted either party to terminate the Cuffley Lease on the service of at least twelve months' written notice to expire on the tenth anniversary of the commencement of the Contractual Demise (the commencement date being 1st April 2002). The solicitors who were identified as acting for the parties on the grant of the Cuffley Lease were, for the Valley View Partners, Gisby Harrison (**"GH"**), and, for the ENH PCT, Crane and Staples (**"CS"**).

134. In 2006 negotiations commenced between the Valley View Partners and the ENH PCT concerning the possibility of the Valley View Partners operating a practice from the Valley View Premises, in addition to the Cuffley Health Centre. Dr Taylor, who was then and remains a Valley View Partner gave evidence that the Valley View Partners initiated these negotiations because they were concerned that they might lose patients to a rival practice at the Valley View Premises. She also gave evidence that the ENH PCT, which had set up a practice at the Valley View Premises with salaried doctors and staff, had concluded that it could not run the Valley View Premises itself, using its own staff and doctors. Dr Taylor identified Nicky Poulain as the individual at ENH PCT who was the point of contact for the Valley View Partners and was responsible for primary care. Dr Taylor also identified Ms Poulain as a doctor, but this is not borne out by other documents which I have seen and, with apologies to Ms Poulain if I have her status wrong, I will not refer to her as a doctor. According to Dr Taylor, it was Ms Poulain who took the lead in negotiating and organising the occupation by the

Valley View Partners of the Valley View Premises. On the Valley View Partners' side negotiations were led by Dr Taylor and Dr Stone. The inception of the move to the Valley View Premises can be traced through the minutes of a series of meetings of the Valley View Partners in 2006 and early 2007.

135. The upshot of these negotiations was that the Valley View Partners did commence to run a medical practice from the Valley View Premises. It will be recalled that the ENH PCT acquired its own interest in the Valley View Premises by virtue of the grant of the Valley View Underlease on 13th December 2006. I do not have a precise date when the Valley View Partners first took up occupation of the Valley View Premises, but it seems to have been in or around early 2007. The Claimants suggested that a likely candidate for the date of occupation would be late March 2007. This looks to be about right, but I agree with the Claimants that nothing turns on the precise date of occupation. The relevant point is that the ENH PCT was able to permit the Valley View Partners to occupy the Valley View Premises, by virtue of its own interest in the Valley View Premises constituted by the Valley View Underlease.

136. The Valley View Underlease did contain, at clause 23, provisions for the payment of a service charge. By this clause the ENH PCT was required to contribute towards the costs of a comprehensive list of services provided to the Valley View Building. The share of the landlord's expenditure on these services which the ENH PCT was required to meet was 80.75%. For the landlord's part, the landlord was required to use all reasonable endeavours to provide the Services, as defined in the Valley View Underlease. The other notable feature of the Valley View Underlease which requires mention is that it contained, at clause 13.1.4, a tenant's covenant not to underlet the whole of the Valley View Premises, and also contained, at clause 15, a tenant's covenant imposing substantial restrictions on underletting part of the Valley View Premises. The restrictions in clause 15 included a covenant not to underlet in total more than 50% of the floor area of the Valley View Premises, and a covenant not to grant an underlease without ensuring that the underlease was contracted out of the protection of the 1954 Act.

137. It is clear that the intention of the parties was that the Valley View Partners should have a formal sub-underlease of the Valley View Premises. This is demonstrated by emails between Ms Poulain and David James, also of ENH PCT, on 15th February 2007 and 15th March 2007. The first of these emails referred to the need to put some form of legal tenure in place, before the Valley View Partners were allowed into occupation of the Valley View Premises *"in order that their tenure, rent and service charges are clearly defined and agreed prior to occupation."*. Mr James also recognised that the ENH PCT would need to ensure that the landlord's approval to *"such sub-tenancy"* had been granted. In cross examination Dr Taylor confirmed that she knew, from the time when she started practising from the Valley View Premises, that it was intended that the Valley View Partners should have a written lease of the Valley View Premises. Dr Taylor also confirmed that the Valley View Partners instructed GH to act for them in the negotiations over the new lease, with CS acting for the ENH PCT. According to Dr Taylor these negotiations commenced shortly after the Valley View Partners took up occupation of the Valley View Premises. There is a note of a staff meeting held on 14th March 2007, chaired by Ms Poulain, at which Ms

Poulain said that, following a meeting with the Valley View Partners, *"she was able to confirm that all outstanding negotiations have been agreed although the contract documentation is still being prepared and therefore yet to be signed"*. In the light of what followed, Ms Poulain's confident assertion that all outstanding negotiations had been agreed looks to me to have been a somewhat optimistic summary of the position. It may be however, given the context of the meeting, that Ms Poulain was referring to the transfer of the existing staff at the Valley View Premises, who had been put in place by the ENH PCT, to the practice of the Valley View Partners. This transfer of staff does not seem to have been problematic.

138. The negotiations over the terms of the new lease do not appear to have moved forward with any great speed, or with a successful outcome. Moving forward in time to 2011, there is a letter from CS to GH dated 31st March 2011. The letter was written by Stephen Harding of CS to Malcolm Hemmings-Portas of GH, who were the individuals in each firm dealing with the terms of occupation, and who were on first name terms. The letter was chasing for a response to earlier letters that year sent to Mr Hemmings-Portas. I quote the letter in full:

> *"I wrote to you on 27th January and on 17th February but I have seen no response.*
>
> *As you know we have been trying for nearly 4 years to conclude a subletting of these premises to your clients.*
>
> *You may also be aware that following recent decisions in respect of the reorganisation of the NHS our client, the Hertfordshire PCT, will cease to exist in 2013.*
>
> *For this reason it is proposed that, notwithstanding all the efforts previously made, your client's occupation of the premises should now be dealt with by an assignment of the Lease, rather than a subletting of most of the premises.*
>
> *We have approached the Landlord's solicitors who have confirmed that there would be no objection to the assignment of the Lease, on the basis that your clients are entitled to rent reimbursement.*
>
> *The PCT have already, just, written to the Practice Manager to advise her of this proposal and you may already, or shortly, receive instructions.*
>
> *The subletting has been on the basis that our clients would retain the Training Room and I understand that it is presently being discussed as to whether this should continue and if so upon what basis.*
>
> *I understand that there are only two GP's in the Practice, but if there are more then (obviously up to a four in number) it would be proposed that the Lease should be granted to all of them.*
>
> *We would also then deal with an assignment, rather than subletting, of the car parking spaces.*
>
> *I should be grateful if you could confirm whether your clients have any objection to accepting an assignment so that we can prepare the appropriate documentation.*
>
> *My clients have indicated that they need matters to be concluded, one way or another, by 30th May 2011.*
>
> *Please could you acknowledge safe receipt of this letter and let me have a swift response so we have as much time as possible to meet the required timetable."*

139. As this letter states, the ENH PCT had been attempting, by CS, to conclude the sub-underletting of the Valley View Premises for a period of nearly four years. In cross examination Dr Taylor confirmed that this statement was correct. The letter also identifies that the ENH PCT was now proposing an assignment of the Valley View Underlease, rather than the grant of a sub-underlease. The reason given for this was that the ENH PCT would cease to exist in 2013. It is not clear whether or, if so, to what extent, the parties and their solicitors had previously taken on board that the Valley View Underlease prohibited a sub-underletting of the entirety of the Valley View Premises.

140. This letter came two months or so after a meeting on 11th January 2011 between Sue Fogden and the Valley View Partners. In an email of the same date Ms Fogden provided some notes of the discussion at this meeting. In this email Ms Fogden described herself as the Property Manager for Hertfordshire Partnership NHS Foundation Trust and Head of GP Premises Development for NHS Hertfordshire, but I assume that she had authority to act on behalf of the ENH PCT. I will need to come back to this meeting, but for present purposes it is sufficient to note that the email recorded points raised by Dr Stone and Dr Taylor on the terms of the intended sub-underletting of the Valley View Premises. The email also recorded Dr Taylor saying that the Valley View Partners wished to restrict their occupation of the Cuffley Health Centre to the ground floor only. There was discussion as to how this might be achieved, and it was noted that the Valley View Partners had the ability to terminate the Cuffley Lease by giving the required 12 months notice to terminate in 2012. In terms of the drafting of what was then still the intended sub-underlease of the Valley View Premises, Ms. Fogden's email recorded the following:

> *"Sue suggested that if the GPs require the PCT to support their proposal of a main branch @ Valley View and a branch surgery @ Cuffley then they should complete the under lease of Valley View asap because without they have no security of tenure. They agreed to but were concerned that they have not seen a copy of the draft under lease, this is surprising given that the PCT's lawyer has been drafting and re-drafting following instructions from the GPs lawyer. Sue agreed to send a copy of the latest draft under lease and the GPs agreed to hastened their lawyer to complete the Valley View Lease asap"*

141. The latest draft lease referred to by Ms Fogden was sent by Ms Fogden to Teresa Bird, the practice manager of what was then referred to as Cuffley and Goffs Oak Medical Practice, on 12th January 2011. The draft lease was forwarded by Ms Bird to the Valley View Partners on the next day. In her email to Ms Bird, Ms Fogden reiterated her surprise that Ms Bird had not seen the draft lease, and referred to the email trail attached to her email from which *"you will see our lawyer and your lawyer engaging in dialogue over the drafting of the lease; hence my surprise that you have not seen it?"*. The dialogue referred to consisted principally of Mr Harding of CS chasing for responses from Mr Hemmings-Portas, but it did include an email from Mr Hemmings-Portas, sent on 30th November 2010, in which he said that *"I shall be letting you have any final comments or outstanding issues as soon as possible and hopefully we can then prepare for completion"*.

142. I note one other matter in relation to the meeting of 11th January 2011. Ms Fogden's email recording what was discussed at the meeting disclosed that, historically, the ENH PCT had not levied service charges in respect of the Cuffley Health Centre, despite having the ability to do so under the terms of the Cuffley Lease. It was recorded that this had changed in the last two years, which I assume to mean the last two years prior to 2011, when annual service charges had been demanded, in the respective sums of £12,000 and £25,000.

143. The concerns of the Valley View Partners as to maintaining their practice at the Cuffley Health Centre reflected an earlier email sent from the Valley View Partners to Ms Poulain, on 30th November 2010, which expressed the following concerns:

> *"Hi Nicki*
>
> *would it be possible to meet with you to discuss the VV lease which we believe is being negotiated and also our ongoing lease at Cuffley as estates have informed us a large amount of building repairs are due at Cufflley, £40,000 to £60,000 next year as well as funding the service charge which is now £20,000, we would be interested in discussing reducing our use of cuffley premises, as it is not finacially viable to continue with both sites current usage. Also staffing costs are duplicated, can you let us know dates you are free or who would be responsible for these matters Also access to the funds £30,000 savings of ours you have may help fund these costs."*

144. The case for consolidation, as between the Cuffley Health Centre and the Valley View Premises was articulated in a business plan, which Dr Taylor confirmed that she had prepared. In March 2011 the Valley View Partners served a break notice to terminate the Cuffley Lease.

145. On 12th May 2011, at a meeting between the parties which was again noted by Ms Fogden in an email to Ms Bird of the same date, it was agreed that the parties should move forward to an assignment of the Valley View Underlease, with a target time of two months for completion of the assignment. In the event however this target was not met, and matters became more drawn out.

146. At around the same time issues concerning service charges were arising. In a meeting which took place on 12th July 2011 the Valley View Partners were informed that the amount of service charges due on the Valley View Premises would be between £40,000 and £50,000. At a further meeting held on 6th September 2011 it was explained to the Valley View Partners that *"In respect of the service charge for Valley View these had not been charged to the Practice because the lease was still under negotiations although the Practice are liable for these costs."*.

147. By this time the person dealing with service charges in respect of the Valley View Premises was Donna Brydon, who was a witness at the trial. Ms Brydon is a senior property manager at the Defendant, and has been in this role since August 2016, while working for the Defendant since 2013. Prior to that Ms Brydon was employed as a property manager by Hertfordshire Primary Care Trust since 2002. Ms Brydon's responsibilities include dealing with the Valley View Premises,

with which she first became involved in 2009. Ms Brydon's evidence was that the bulk of the services provided for the Valley View Premises were provided by the Doshis, in their capacity as tenants under the Valley View Headlease. The only services provided specifically to the Valley View Premises were, and remain what I understand to be an independent gas supply to the Valley View Premises and boilers (I believe there are, or at least were two of them) serving the Valley View Premises. Subject to some interruption which I will describe, the maintenance and servicing of the boilers have been dealt with by the ENH PCT and, in succession to the ENH PCT, the Defendant.

148. Ms Brydon gave evidence that in or around 2009 she started to keep a spreadsheet document, which she called a completion statement, as it was intended to be part of the completion of the grant of a formal lease of the Valley View Premises to the Valley View Partners. Invoices received from the Doshis for rent and service charges were entered on this spreadsheet, together with any additional maintenance costs incurred by the ENH PCT in connection with the boiler, and gas charges. The object of the exercise, as Ms Brydon explained in her witness statement, was to keep the spreadsheet as a running document of what the charges for the Valley View Premises actually were. The spreadsheet was sent to the Valley View Partners on a quarterly basis. Ms Brydon continued to do this until negotiations with the Valley View Partners over formal terms for their occupation of the Valley View Premises broke down in 2015. In cross examination I understood Ms Brydon to accept that actual invoices for charges in respect of the Valley View Premises were not sent out to the Valley View Partners prior to 2011.

149. Returning to the narrative, progress towards completion of the assignment of the Valley View Underlease continued to be slow. A meeting was held on 12th December 2012 between the parties, for the purposes of agreeing a way forward, at which various issues were discussed in relation to the Cuffley Health Centre and the Valley View Premises. The meeting was recorded in an email sent on 29th January 2013 by Jacki Collett of NHS Hertfordshire. The negotiations for the assignment were recorded as being *"almost there"*, so far as the ENH PCT was concerned. In terms of historic service charges it was recorded *"The GP's have seen the PCT spreadsheets, which details these costs. It has been agreed that they would pay the short fall in 12 monthly instalments"*.

150. On 10th January 2013 Ms Brydon emailed a colleague, responding to requests for information about Valley View and Cuffley Health Centre. In terms of the service charge position in relation to the Valley View Premises, Ms Brydon said this:

> *"£90K Service Charge at Goffs Oak — This has now increased to £95,085.70 as per the attached Completion Schedule. The reason this has not been charged previously is because the lease had not been completed between parties. Discussions have been had with our lawyers regarding this and we were advised of the potential risk that once we started charging, the GPs could have secured rights of occupation without any terms agreed and with the problems being experienced with their occupation at the Cuffley Surgery we took a view not to charge and to endeavour to complete the lease negotiations asap. The practice are aware of these costs and because it would cause them severe financial difficulites it has been agreed,*

as a condition of the Assignment that they will repay this amount over 12 monthly instalments."

151. It was at this point that problems began to arise between the parties, in relation to the alleged arrears of service charges. On 30th January 2013 Dr Stone emailed Ms Collett stating that he wished to clarify the position of the Valley View Partners on accrued service charges at Valley View. He referred, and provided links to two articles, which he described in the following terms:

"As you can see this is a national problem with PCT's claiming accrued service charges from practices which do not have leases with PCT's 450 practices nationwide. As you will see in the articles, Peter Holden of the GPC is advising practices that there is no legal basis for the PCT to claim service charges from GP's if, as in our case there is no lease agrement. He is advising practices not to pay accrued service chares if there is no lease in place. We therefore are not agreeing to pay the accrued service charges presently, our solicitor is aware of our position and he has been in communication with your solicitors, please check with your solicitors, your will find we have not instructed our solicitor to agree to pay the accrued service charges,

please do contact me if you wish to discuss or negotiate this further this further.

Concerning the lease at valley view there is still a problem with the buiding warranties which make it difficult for us to sign a sublease. Our solicitor informs us these warranties are not transferrable to us. The PCT has offered to indemnify these however our solicitor does not advise this is legally possible, this problem with the warranties has been present for years, I do not know how it can be resolved,"

152. This stance was not accepted by the ENH PCT. On 7th March 2013 Ms Brydon wrote to the Valley View Partners stating that she would be sending them an invoice for £668,497. The invoice itself is dated 18th March 2013; comprising a combination of rent (including rent in respect of the Valley View Parking Spaces) and service charges said to have accrued since the Valley View Partners took up occupation of the Valley View Premises, gas bills in respect of the independent gas supply, and charges for servicing the boilers. The size of the invoice reflected the fact that the Valley View Partners had made no payments in respect of their occupation of the Valley View Premises, since first taking up occupation in 2007. On 18th March 2013 Ms Brydon emailed the Valley View Partners, having spoken to the solicitor acting for the ENH PCT, with a proposal for resolving the two main issues standing in the way of the assignment of the Valley View Underlease (and the Valley View Parking Lease which was also mentioned). In terms of service charges it was said to have been agreed in principle that the Valley View Partners would pay off the service charge arrears over a 12 month period. In response to this email Dr Stone suggested that the solicitor for ENH PCT got in touch with Mr Hemmings-Portas, the solicitor at GH.

153. Pausing at this point to deal with the boilers, Ms Brydon's letter of 7th March 2013 also notified the Valley View Partners that it was the intention of the ENH PCT to notify the gas supplier that the Valley View Partners would be responsible for the supply with effect from 1st April 2013, and that the ENH PCT would also

be cancelling its contract in respect of boiler maintenance and repair with effect from 31st March 2013. This left the Valley View Partners to pay for the gas supply and maintain the boilers. In her witness statement however Ms Brydon explained that the Valley View Partners did not maintain the boilers. There is evidence in the documents, confirmed by Dr Taylor in cross examination, that the boilers broke down in December 2015 and again in August 2016. On each occasion the Valley View Partners demanded that the Defendant deal with the problem. In cross examination Dr Taylor explained that the view taken by the Valley View Partners was that the boilers were the responsibility of the Defendant, not the Valley View Partners. Given the dangers posed by an un-serviced boiler, the Defendant did take back responsibility for servicing and maintaining the boilers, and has continued to do so. In cross examination Dr Taylor confirmed that the Valley View Partners had been paying the gas bills for the gas supply since 2013. It would appear therefore that Ms Brydon's stipulation, in her letter of 7th March 2013, that the Valley View Partners should be responsible for the gas supply, for the future, was accepted by the Valley View Partners.

154. On 1st April 2013 the Defendant took over the Valley View Premises. Ms Brydon continued to send out statements showing the position concerning what were said to be the accruing service charge arrears.

155. Thereafter, negotiations between the parties continued in a desultory fashion. On 7th November 2013 there was a meeting between the Valley View Partners and Ms Brydon. Ms Brydon provided a record of the meeting in a letter which she sent to the Valley View Partners on 6th December 2013 (there seem to be two versions of this letter, with the second version dated 10th December 2013). In terms of the assignment of the Valley View Underlease, the letter recorded that *"You advised that when you originally occupied the building you were not made aware of the fact that you would be liable for the running costs of the building by the previous Primary Care Trust and this only became apparent when lease negotiations commenced in 2009"*. In the light of this Ms Brydon proposed, subject to approval by head office, to write off any service charges accruing due prior to 1st April 2010, which she said would reduce the shortfall by £41,089.00.

156. There was a considerable hiatus before the Valley View Partners responded to this offer, but they did so on 2nd May 2014, when Dr Taylor emailed Ms Brydon acknowledging the offer of a reduction of some £40,000, but saying that the Valley View Partners wanted to check some of the payments. Dr Taylor apologised for the delay in replying, and said that Mr. Hemmings-Portas had left GH, and that they now had a new solicitor within the firm dealing with the matter. Things then appear to have gone quiet again for a considerable period of time. On 29th July 2015 Cal Shelton of the Defendant emailed the Valley View Partners, following a conversation with Dr Taylor the previous week, requesting the following:

> *"Request the Practice advise NHS Property Services the date the Practice will execute a lease by 5.00pm GMT, Friday, 31 July 2015*
> *Request immediate payment in satisfaction of non-reimbursable charges for £72,412.94, being the invoiced amount of £114,221.94 less the offered credit note of £41,809.00*

Alternatively, should the Practice be unable to action immediate payment, we are not willing to extend to the Practice any further credit and will only negotiate a payment arrangement for the full amount of £114,221.94"

157. Dr Taylor replied by email on 30th July 2015 saying that she had discussed matters with Dr Stone, and would speak to their solicitor and then reply. There followed an email from Spencer Grimshaw of GH on 31st July 2015. Mr. Grimshaw had taken over the matter from Mr Hemmings-Portas. Mr. Grimshaw asked for a copy of the draft lease and agreed heads of terms (if any) together with the freehold title details and said that he would progress matters. Mr. Grimshaw concluded in the following terms:

"Assuming that the draft lease is in a reasonable form I would see no reason why it shouldnt be completed by the end of August subject of course to the parties agreeing a mutually satisfactory schedule for repayment of the rent arrears and any historic service charges properly payable."

158. There were further negotiations in 2015, concerning the historic service charges, which culminated in an email exchange at the end of October 2015 between Ms Brydon and Dr Taylor. Ms Brydon proposed repayment of what was said to be the debt over a six month period. Dr Taylor responded to say that the terms of agreement were *"OK"*, and matters could now be progressed.

159. Matters did not however progress. On 29th February 2016 Dr Stone emailed Ms Brydon in the following terms:

"We write in connection with the ongoing discussions in relation to the Valley View surgery and, in particular, the rental and service charge costs that are alleged to be payable by the practice as a result of our occupancy. Having reviewed the position we cannot see the legal basis upon which these sums are payable by the practice as there is no agreement in place as between ourselves, hence why negotiations are ongoing over the possibility of us taking an assignment of the head lease that you hold. With this being the case our position is that we do not see that these sums are payable. To this regard, and albeit that we do not believe that any offer to pay any sums has been made, in the unlikely event that an offer to pay any recurring premises costs (including, without limitation rent and service charges) is perceived to have been made, please accept this e mail as our formal retraction of the same."

160. This email followed a meeting of the Valley View Partners on 20th November 2015. The minutes of this meeting record the following from Dr Stone:

"Dr Stone then mentioned that we shouldn't be paying for these service charges as we have not ever accepted the lease and we are not the tenants. It should be PCT who meant to pay these charges. He then showed us the guidelines from BMA which clarify his point. Dr Stone happy to contact the BMA and will advise us about the result later till then we should be holding/ block on to the other solicitors which thought we should be paying for these cost which is Gisby Harrison."

161. Dr Stone's email of 29th February 2016 effectively put an obstacle in the way of the negotiations over the assignment of the Valley View Underlease. The

Defendant would not proceed with the assignment without payment of what it said were the outstanding service charges. The Valley View Partners were not prepared to pay the sums demanded. On 21st September 2017 the Defendant's current solicitors, Bevan Brittan wrote to BMA Law, the solicitors instructed by the Valley View Partners, demanding payment of arrears of rent accrued since 2006, and what were said to be service charge arrears in the sum of £180,074.17. The rent arrears were identified as being capable of direct payment to the Defendant by NHSE or as reimbursable by NHSE. The alleged arrears of service charge were identified as being non-reimbursable. Terms were offered for paying off the alleged arrears of service charge over five years, subject to which Bevan Brittan said that the Defendant was, on a subject to contract basis, willing to offer the Valley View Partners a lease of the Valley View Premises. BMA Law responded on 23rd October 2017, disputing that the alleged arrears of service charge were recoverable, but seeking further information as to what was said to be due by way of the relevant service charges.

162. Dr Stone left the Valley View partnership in January 2018. There are minutes of a partnership meeting held on 24th January 2018, at which the Valley View Partners, Dr Taylor and Dr Vernazza, agreed to instruct Robert Day, at BMA Law, to enter into negotiations with the Defendant *"to negotiate to the minimum amount for the outstanding service charge arrears and to negotiate a sub-lease with a break clause"*. This was followed by a meeting of the Valley View Partners and Mr Day of BMA Law with representatives of NHSE and the relevant CCG on 27th March 2018. There are minutes of this meeting. One of the purposes of the meeting was expressed to be the exploration of any support which could be provided, which was *"within the gift"* of NHSE and the CCG. The minutes record that *"The commissioner"*, which I take to be a reference to NHSE/CCG, advised that *"the rent and rates had been accrued by NHSE and would be paid (either direct or via the practice) on settlement of the service charges and signing the lease"*. The minutes also record that the commissioners made it clear that they were not able to provide financial support for the service charges *"on the basis of equity"*. I take this to mean that NHSE/the CCG were making it clear that their support for service charges was limited to what could be provided pursuant to the 2004 or 2013 Directions, which I have discussed earlier in this judgment.

163. On 23rd October 2018 BMA Law wrote to Bevan Brittan indicating that the Valley View Partners had no objection to the reimbursable rent being paid to the Defendant, and would authorise such payment by NHSE. So far as service charges were concerned, BMA Law denied that the Valley View Partners were liable to pay service charges for the period of their occupation. BMA Law articulated the argument of the Valley View Partners in this respect in the following terms:

> *"The Partners have been in occupation of the Premises since 1 April 2007 without a documented sub-lease. The terms of their tenancy will determine whether or not service charges are payable. Ascertaining the terms will depend on all of the circumstances which relate to the Premises including any conversations and any documents. Where there is no history of payment for services (as is the case here), there is no separate contractual obligation to pay service charges. The mere fact of occupation of the Premises or use*

of services does not of itself create an obligation to pay for them. In such a case, payments of rent will be interpreted as being inclusive of services. For a contractual obligation to pay for services to exist, it would be necessary for the Partners to have agreed with the PCT or NHSPS that at a future date services might become chargeable in addition to rent. We are instructed the Partners did not agree anything of the like with NHSPS or its predecessor PCT.

The lease that is in place, between JV and RJ Doshi and East and North Herts PCT dated 13 December 2006 imposes an obligation for that tenant to meet the service charge demands. It is our understanding that the PCT, and subsequently NHSPS, have made payments to their landlord in line with that lease. There is no separate agreement to pass these costs down via the undocumented sub-tenancy.

In emailed correspondence you have suggested that there is a common law duty for tenants to pay charges based on use and occupation of the Premises. We disagree. There can be an implied term to pay a fair and reasonable rent for the enjoyment of the land occupied', hence the rental reimbursements detailed above, but no such obligation exists in respect of service charges.

In the circumstances, there is no obligation for the Partners to reimburse the costs that NHSPS have paid to their landlord and await your confirmation that such charges are no longer being sought."

164. The letter from BMA Law of 23rd October 2018 did conclude by saying that the Valley View Partners were *"prepared to negotiate a documented lease going forward in the form approved by the BMA"*. The letter referred to discussions as ongoing and confirmed the commitment of the Valley View Partners to regularising their occupancy of the Valley View Premises.

165. In January 2019 NHSE paid rent for 11 years in respect of the Valley View Premises. The sum paid was £1,082,954.09. The alleged arrears of service charge remained unpaid.

166. In May 2019 Ms Fogden emailed Teresa Bird and Mr Day of BMA Law, chasing settlement of the unpaid service charges and regularisation of the occupation of the Valley View Partners. The subsequent email exchange ended with an email to Ms Fogden from Clare Good at Capital Law Limited, the solicitors acting for the Claimants in the five actions. The email, sent on 3rd July 2019, brought any further negotiations to a halt, in the following terms:

"We act on behalf of Cuffley and Goffs Oak Medical Practice and have issued a letter of claim to NHSPS via its lawyers - Bevan Brittan - regarding service charge disputes at numerous GP Practices. Cuffley and Goffs Oak Medical Practice are one of the claimant practices in that claim.

In the circumstances, they will not be completing a new lease or discussing any alleged service charges until the matter is resolved with NHSPS."

Valley View – discussion and determination of the issues

(i) Valley View – tenancy at will or periodic tenancy?

167. It is clear, and I so find, that when the Valley View Partners took up occupation of the Valley View Premises, they did so without any formal lease having been

put in place and, for that matter, without any document which recorded any agreed terms on which the occupation was taking place.

168. The parties are agreed that the Valley View Partners occupied the Valley View Premises pursuant to a tenancy (the Valley View Tenancy), but are not agreed on the nature of that tenancy. The rival candidates are implied periodic tenancy (the Claimants) or tenancy at will (the Defendant).

169. Where a party is allowed into occupation of the land of another, without the parties having agreed terms for the relevant occupation, the law is left to imply, from anything which was agreed and from all the surrounding circumstances, those terms which the parties are to be taken to have intended to apply. In terms of the nature of the right of occupation, there are a number of possibilities. The arrangement may only amount to a licence. Where however a party is allowed into possession of land and pays rent on a regular basis, it may be appropriate to imply a periodic tenancy. In a commercial case this can be significant because the periodic tenancy, assuming business occupation by the tenant, may well qualify for the protection of the 1954 Act. Another possibility is that the law will imply a tenancy at will. The essence of a tenancy at will is that the tenancy is on terms that either party may determine the tenancy at will at any time; see Woodfall's Landlord and Tenant, Volume 1, at 6.062. For as long as the tenancy at will subsists the tenant is entitled to exclusive possession of the relevant land, but the tenancy is precarious because it subsists at the will of the parties. Either party may determine the tenancy at will at any time. In a commercial case the particular significance of a tenancy at will is that it is not capable of enjoying the protection of the 1954 Act, in marked contrast to a periodic tenancy.

170. The leading case on when the law should imply a tenancy at will rather than a periodic tenancy, in circumstances where a party is allowed into occupation of land without a formal lease or tenancy, is *Javad v Aqil* [1991] 1 W.L.R. 1007. This authority was cited to me by both parties, and both parties concentrated their submissions on this authority. In *Javad* the plaintiff landlord allowed the defendant tenant into occupation of premises on payment by the tenant of £3,500, which was identified as three months rent in advance. The intention of the parties was that they would agree the terms of a formal lease. A draft lease was prepared, and was the subject of negotiations between the parties. While the negotiations were in progress the tenant remained in possession of the relevant premises, apart from a brief period when the tenant vacated the premises following differences with the landlord. While in possession the tenant paid rent on a quarterly basis on two further occasions. Eventually negotiations between the parties broke down, and the landlord sought possession of the premises, on the basis that the tenant was a tenant at will. The tenant claimed to have a periodic tenancy. At first instance the judge held that it was not possible to infer a periodic tenancy, and that the tenant only had a tenancy at will. This decision was upheld by the Court of Appeal.

171. In his judgment in the Court of Appeal, with which Ralph Gibson and Mustill LJJ agreed, Nicholls LJ (as he then was) explained the correct approach to determining what interest the tenant had in the following terms, at 1012D-G:

> *"As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification "failing more." Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so, however large or small may be the amount of the payment."*

172. Nicholls LJ went on to add this observation, at 1012H-1013A:

> *"To this I add one observation, having in mind the facts of the present case. Where parties are negotiating the terms of a proposed lease, and the prospective tenant is let into possession or permitted to remain in possession in advance of, and in anticipation of, terms being agreed, the fact that the parties have not yet agreed terms will be a factor to be taken into account in ascertaining their intention. It will often be a weighty factor. Frequently in such cases a sum called "rent" is paid at once in accordance with the terms of the proposed lease: for example, quarterly in advance. But, depending on all the circumstances, parties are not to be supposed thereby to have agreed that the prospective tenant shall be a quarterly tenant. They cannot sensibly be taken to have agreed that he shall have a periodic tenancy, with all the consequences flowing from that, at a time when they are still not agreed about the terms on which the prospective tenant shall have possession under the proposed lease, and when he has been permitted to go into possession or remain in possession merely as an interim measure in the expectation that all will be regulated and regularised in due course when terms are agreed and a formal lease granted."*

173. At 1013B-D, Nicholls LJ addressed specifically the situation where negotiations were in progress, in the following terms:

> *"Of course, when one party permits another to enter or remain upon his land on payment of a sum of money, and that other has no statutory entitlement to be there, almost inevitably there will be some consensual relationship between them. It may be no more than a licence determinable at any time, or a tenancy at will. But when and so long as such parties are in the throes of negotiating larger terms, caution must be exercised before*

inferring or imputing to the parties an intention to give to the occupant more than a very limited interest, be it licence or tenancy. Otherwise the court would be in danger of inferring or imputing from conduct, such as payment of rent and the carrying out of repairs, whose explanation lies in the parties' expectation that they will be able to reach agreement on the larger terms, an intention to grant a lesser interest, such as a periodic tenancy, which the parties never had in contemplation at all."

174. Applying these principles to the facts of the case, Nicholls LJ concluded that the decision of the judge should be upheld. As Nicholls LJ stated, at 1018G-1019B:

"I can see no ground for disturbing the judge's conclusion. Upon a fair reading of the necessarily imperfect note of his judgment, it is clear that the judge approached the issue before him in the correct way. From the conclusions he expressed, it is apparent that the essential question to which he directed his attention was whether in all the circumstances it was right to infer the creation of a periodic tenancy. He noted the basis on which the tenant went into possession: it was on terms that the parties would eventually agree a lease. This was supported by the landlord's evidence. The judge's note of the evidence, in the relevant parts, reads: "I let them in. Our agreement was subject to lease being agreed. If no lease should be agreed the premises should return to [landlord]." In cross-examination: "[The tenant] took premises on basis that he would sign lease... I let [tenant] into premises because he was going to sign lease subsequently." In fact, as already noted, the parties seem never to have reached agreement on all the terms. The tenant's evidence was to a different effect. He said that the landlord

> *"never said that if a lease was never finalised between us I would have to go. This matter was never raised... Nothing was said about my occupation being subject to my signing a lease."*

In cross-examination the tenant went further: "[Landlord] said even if lease did not go through I could continue as a tenant." From the judge's conclusions it is plain that on this he preferred the landlord's evidence."

175. The reference made by Nicholls LJ to the *"throes of negotiations"* was considered by Patten LJ in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] EWCA Civ 303 [2014] 2 P.&C.R. 4, which is the only other case to which I need to make reference in this context. In this case the tenant was holding over from a lease, the term of which had expired. The lease was contracted out of the 1954 Act, and thus came to an end on the contractual term date. The parties were in negotiations for a renewal of the lease, but terms were not agreed, and the period of holding over became prolonged. Somewhat unusually, it was the landlord which argued that the tenant had an implied annual tenancy, while the tenant said that it had only a tenancy at will. The reason for this reversal of roles was that the argument was concerned with whether the tenant had given adequate notice to terminate the tenancy, which in turn affected the amount of rent due to the landlord in respect of the period of holding over. The judge at first instance concluded that the parties had created a new yearly periodic tenancy when the original lease came to an end, which required six months notice of termination.

176. This decision was overturned by the Court of Appeal. In his judgment, with which Christopher Clarke and Longmore LJJ agreed, Patten LJ made reference to *Javad*, and summarised its effect in the following terms, at [23]:

> *"When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in Javad v Aqil, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see Cardiothoracic Institute v Shrewdcrest Ltd [1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."*

177. At [24], Patten LJ went on to consider what was required, in terms of negotiations. As he explained, the concept is a flexible one:

> *"The judge interpreted the reference by Nicholls LJ to the throes of negotiation as importing some requirement for a particular intensity of negotiations. But, in my view, it means no more than that the negotiations should be continuing in the sense that both parties remain of the intention that there should be a new lease on terms to be agreed. Mr Rosenthal for EHL accepted that one could have a case in which the negotiations either broke down or came to an end but the tenant was allowed to remain in occupation paying the rent and other outgoings. In time the correct inference in such a case might be that the parties had chosen to regulate their legal relationship by something other than the grant of a new long lease and a periodic tenancy might then be implied."*

178. One other matter in *Javad* which is potentially relevant is that there was no claim in that case that the occupation of the person described as a tenant was in fact occupation pursuant to a licence. The landlord did seek to argue, in the Court of Appeal, an alternative case that the tenant was in fact a licensee, but was not permitted to do so. The available choices were thus tenancy at will or periodic tenancy. In the present case the situation is the same. The available choices are tenancy at will or periodic tenancy.

179. I turn to apply the principles set out in *Javad* and *Erimus* to the present case. I have already set out a summary of the dealings between the Valley View Partners, on the one side, and the ENH PCT. It is clear, and I so find, that the intention on both sides, when the Valley View Partners took up occupation of the Valley View Premises, was that a formal lease should be granted, the terms of which remained to be settled by negotiation between the parties. On the Valley View Partners' side Dr Taylor confirmed in cross examination that this was the position. On the ENH PCT's side the position is confirmed by the email exchange between Ms Poulain and Mr James on 15th February 2007 and 15th March 2007.

180. Thereafter the evidence demonstrates, and I so find, that the negotiations continued between the parties. It is true that the negotiations appear to have proceeded very slowly, with lengthy gaps between communications. It is also true that the focus of negotiations changed over the course of time. Between 2007 and 2011, the intention was that the Valley View Partners would be granted a new lease. As from 2011 this intention changed to an intention that there should be an assignment of the Valley View Underlease. At some stage thereafter, and although this may have been the result of a lack of attention to what was actually being negotiated between the parties, the evidence of the documents is that the parties had reverted to the grant of a new lease. The relevant point is however that both sides conducted themselves on the basis that they were in negotiations to settle the formal terms upon which the Valley View Partners would occupy the Valley View Premises.

181. The Claimants submitted that the present case could be distinguished from *Javad* and *Erimus*, because the Valley View Partners and the ENH PCT had already concluded negotiations for the terms of occupation of the Valley View Premises, before the Valley View Partners took up occupation. On the evidence this submission is unsustainable. I accept that there are documents from 2006 and 2007 which demonstrate that some matters had been agreed between the Valley View Partners and the ENH PCT, in terms of the taking over of the practice at the Valley View Premises. It is however, as I have said, quite clear that the parties intended that there should be the grant of a formal lease, the terms of which remained to be settled. In reality, the highest this submission can be put is that Ms Poulain described all outstanding negotiations as having been agreed at the staff meeting on 14th March 2007. If this was a reference to negotiations over the terms of occupation, it seems to me that this was clearly wrong. It seems to me however, as I have already said, much more likely that Ms Poulain was here referring to terms for the transfer of employees between the Cuffley and Valley View practices.

182. I also accept that there is little or no evidence of anything happening, in terms of negotiations, between 2007 and 2011. It is however clear that negotiations were not regarded as concluded during this period, and that negotiations were not regarded as abandoned during this period. Mr. Harding's letter of 31st March 2011 referred to efforts *"for nearly four years to conclude a subletting of these premises to your clients"*. Dr Taylor confirmed the correctness of this statement in cross examination. I find that this statement was correct and that, in however desultory a fashion, negotiations between the parties over the terms of occupation of the Valley View Premises by the Valley View Partners were treated as

continuing and did continue during the four year period referred to by Mr Harding. As from 2011 there is ample evidence of the continuing negotiations, albeit with considerable delays and gaps, until Ms Good called a halt in her email of 3rd July 2019. I therefore find that the negotiations also continued between 2011 and the inception of the present dispute in 2019.

183. The Claimants' alternative submission was that there was a period of over two years during which the parties could not be said to have been in *"the throes of negotiations"*, within the meaning given to that phrase by Nicholls LJ in *Javad*. The period referred to was between 2007 and 2009, when Ms Brydon became involved with the Valley View Premises. There are however obvious problems with this alternative submissions. First, and as I have already found, while there may be little evidence of any negotiations continuing between 2007 and 2009, I am satisfied, on the evidence which I have received and heard, that negotiations were treated as continuing and did continue during this period. Second, this submission was largely based upon evidence given by Ms Brydon in cross examination that lease negotiations did not start until 2009. In re-examination of Ms Brydon however the point was brought out that Ms Brydon had no knowledge of any negotiations prior to her involvement in 2009. I took Ms Brydon's evidence in re-examination to qualify what she had said in cross examination, and to mean that the true position was that Ms Brydon had no knowledge of any earlier negotiations, which would not be surprising given that not much seems to have happened between 2007 and 2009.

184. Beyond this however, the Claimants' alternative submission seems to me to adopt too rigid an approach to what said in *Javad* and *Erimus*. The categories of circumstances in which a tenancy at will can arise are not closed. The question is always whether the parties intended that the occupation of the relevant premises by the relevant party should only continue at the will of the parties. It does not seem to me that there have to be continuing, or indeed any negotiations for a tenancy at will to arise. It is possible to think of other circumstances in which a tenancy at will might arise. Where however the parties are in negotiations, and as Patten LJ has made clear, there is no requirement for any particular intensity of negotiations. All that is required and, as I have found, existed in the present case, is that both parties should remain of the intention that there should be a new lease on terms to be agreed. If one does assume, contrary to my findings of fact, that nothing at all happened in terms of negotiations, between 2007 and 2009, I do not see that this hiatus precludes the finding of a tenancy at will, if negotiations did thereafter take place, as they clearly did.

185. I also consider it important to keep in mind that one consequence of the Valley View Claimants being found to have an implied periodic tenancy is that their occupation of the Valley View Premises would enjoy the protection of the 1954 Act. One of the features of the draft lease of the Valley View Premises which was circulating between the parties in January 2011 was that it provided for the proposed new lease (strictly sub-underlease) to be contracted out of the 1954 Act. In my judgment this is good evidence that the parties did not intend that the new lease of the Valley View Premises should have 1954 Act protection. There is also the point that the existence of a protected sub-underlease, in the form of a periodic tenancy, would have engaged a breach of the alienation covenants in the

Valley View Underlease. While this problem also exists, at least in theory, if the Valley View Tenancy is a tenancy at will, the problem is much less acute if the Valley View Tenancy does not enjoy statutory protection. Putting these various considerations together, it is difficult to see that the parties had a mutual intention that the Valley View Partners should have, pending the grant of their new lease, a periodic tenancy which would be protected by the 1954 Act.

186. The present case is not on all fours with the facts of either *Javad* or *Erimus*. The present case did not involve a short period of initial occupation or holding over, during which negotiations were taking place for the grant of a new lease. In the present case the period of occupation continued for over a decade, with negotiations continuing at irregular intervals and often in a desultory fashion. Nor were the negotiations confined to negotiations for the grant of a new lease. For at least part of the relevant period of over a decade the negotiations shifted to the terms of an assignment of the Valley View Underlease. It is also worth noting that the present case is not one of a party going into possession and paying rent. The Valley View Partners paid nothing for their occupation until January 2019, and what they paid then were arrears of rent which were funded by NHSE.

187. I do not think that these differences from the facts in *Javad* or *Erimus* are material. The question of whether a tenancy at will or some other tenancy, or indeed licence has been created in any particular case is a fact sensitive question. The essential question, to be answered by reference to what (if anything) was agreed and from all the surrounding circumstances, is what terms the parties are to be taken to have intended to apply to the occupation by the relevant party of the relevant land.

188. Looking at all the surrounding circumstances in the present case, and bearing in mind the lack of agreement between the parties over the terms of occupation of the Valley View Premises, and bearing in mind the intention of the parties to formalise the occupation of the Valley View Partners and the negotiations to that end, the present case seems to me to be one where the answer to the question posed in my previous paragraph is clear. The occupation of the Valley View Premises by the Valley View Partners is correctly interpreted as having given rise to a tenancy at will, which is still continuing.

189. I therefore conclude that the Valley View Tenancy is a tenancy at will.

(ii) <u>Valley View - Is the Defendant obliged to continue to provide services under the Valley View Tenancy and, if so, which of the services referred to in Amended Schedule 1 to the Valley View Amended Defence and Counterclaim?</u>

190. As I have already found, the Valley View Partners took up occupation of the Valley View Premises without having agreed terms of occupation. In these circumstances, and as Nicholls LJ explained in *Javad* (at 1012D-E), the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply.

191. The position in relation to Valley View is an unusual one. The bulk of the services provided to the Valley View Building are provided by the Doshis. They are not provided by the Defendant. The only exception to this comprises the boilers. As

I have noted above, the Defendant has, in succession to the ENH PCT and subject to the interruption described earlier in this judgment, taken responsibility for maintaining the boilers, which I assume to provide hot water and heating to the Valley View Premises. The Defendant does owe obligations in these respects, but they are owed to the Doshis. The Defendant is required to pay a service charge to the Doshis, comprising 80.75% of the recoverable service charge expenditure. So far as the boilers are concerned, it looks as though they fall within the terms of the Defendant's repairing covenant, in clause 9 of the Valley View Underlease. My knowledge of the Valley View Premises is not sufficient to be definite on this point. The Claimants submitted that the Defendant was subject to the obligation to maintain the boilers by virtue of clause 16.1.3 of the Valley View Underlease, but it seems to me that this is a misreading of clause 16.1.3. Clause 16.1.3 is one of several sub-clauses, subordinate to clause 16.1, which specify the purposes for which the landlord is permitted to enter the Valley View Premises. The tenant's covenant, in clause 16.1, is to permit such access for the specified purposes. In any event, it was acknowledged by the Defendant in closing submissions to be common ground between the parties that the Defendant was liable, as tenant under the Valley View Underlease, to keep the boilers in repair.

192. This unusual position seems to me to render it difficult to say that the Defendant is obliged to provide any service under the terms of the Valley View Tenancy. Not only is there no evidence of any agreement to this effect having been reached between the Valley View Partners and the ENH PCT/the Defendant, nor any evidence of conduct supporting the existence of such an obligation. Any such obligation would have obliged the ENH PCT, and would now oblige the Defendant to provide services which are in fact provided by the Doshis, and over which the Defendant has no control.

193. The possible exception to this relates to the boilers. Historically, the ENH PCT and the Defendant have assumed responsibility for maintenance of the boilers. It is true that, by her letter of 7th March 2013, Ms Brydon communicated the position of the Defendant that it intended to cease paying for the gas supply and to cease responsibility for maintaining the boilers. The Defendant was however subsequently required to reverse its stance on the boilers, because the Valley View Partners did not regard themselves as responsible for the boilers. It was very clear from Dr Taylor's evidence in cross examination that the Valley View Partners always took the view that the boilers were not their responsibility, but the responsibility of their landlord; namely the ENH PCT and then the Defendant. For the majority of their occupation of the Valley View Premises, this stance has effectively been accepted by the ENH PCT and the Defendant.

194. I do not think that it can be right to treat the Defendant as being subject to an obligation under the Valley View Tenancy to provide the services which are in fact provided by the Doshis. There is no evidence of the parties having conducted themselves on this basis, and such an obligation seems to me to be inconsistent with a situation where the Defendant is not itself in control of the provision of the relevant services.

195. I think that the boilers constitute an exception to this analysis. Looking at all the surrounding circumstances and, in particular, the previous conduct of the parties, it seems to me that the parties should be taken to have intended that the ENH PCT and, now, the Defendant would be responsible for the servicing and maintenance of the boilers.

196. I therefore conclude that there is only one service which the Defendant is obliged to continue to provide under the Valley View Tenancy; namely the servicing and maintenance of the boilers which serve the Valley View Premises. The precise wording of this obligation remains to be settled, and is a matter on which I will admit (following hand down of this judgment) further, limited argument, if the relevant wording cannot be agreed.

(iii) Valley View - Is the rent payable under the Valley View Tenancy an all-inclusive rent, or does the Valley View Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant (in addition to the rent) and, if so, on what basis and for which services?

197. The first question is whether the rent payable under the Valley View Tenancy should be taken to be all-inclusive, so that there is nothing to be paid additional to the rent.

198. There is no evidence of any express agreement between the parties to this effect, either when the Valley View Partners first took up occupation of the Valley View Premises or thereafter. In cross examination Dr Taylor accepted that no one from the ENH PCT ever stated to the Valley View Partners that there would be no service charges payable in respect of the Valley View Premises, nor did any of the Valley View Partners suggest this to the ENH PCT. So the question remains whether, by reference to anything agreed between the parties and by reference to the surrounding circumstances, the parties can be taken to have intended that the rent payable under the Valley View Tenancy should be all-inclusive. There are some formidable obstacles in the way of a positive answer to this question.

199. First, this is not a case where the Valley View Partners actually paid any rent for the Valley View Premises, until 11 years' worth of rent were paid in January 2019. The rent does not seem to have been a matter of significant concern to the Valley View Partners, either before or after they occupied the Valley View Premises. This situation might be thought extraordinary, until one remembers that the rent was not, ultimately, the concern of the Valley View Partners, because they could expect its reimbursement, pursuant to the 2004 Directions and, subsequently, the 2013 Directions. The relevant point is that there is no evidence of any significant focus on the rent payable for the Valley View Premises, and no evidence of any focus on the question of whether the rent would be an all-inclusive.

200. In fact, and so far as one can tell, the rent payable under the Valley View Tenancy appears to have been determined by reference to a three yearly rent review pattern, reflecting the rent review provisions in the Valley View Underlease. The explanation for this three year rent review pattern would have been that this reflects the valuation process provided for by the 2004 Directions and the 2013

Directions, whereby the rent payable for GP premises, which is reimbursable, is subject to three yearly assessments by the District Valuer.

201. Second, the conduct of the Valley View Partners was, for a very substantial period of time, completely inconsistent with the notion that the rent payable under the Valley View Tenancy was all-inclusive. I accept the point made by the Claimants that there is no evidence of service charges being raised as separate charges payable by the Valley View Partners until 2009, at the time when Ms Brydon first became involved with the Valley View Premises. What is however striking in relation to the dealings between the parties thereafter is that none of the Valley View Partners suggested that the rent was all-inclusive. To the contrary, the Valley View Partners negotiated with the ENH PCT and thereafter with the Defendant, over the amount of arrears of service charge which the Valley View Partners would have to pay, and how long the Valley View Partners would have to clear these arrears. I have chronicled the principal stages of these negotiations in my summary of the relevant history of Valley View.

202. What is also telling in this context is the terms of the challenges which were made to the ability of the Defendant to recover a separate service charge. When Dr Stone emailed Ms Collett on 30th January 2013, he did not say that the rent was all-inclusive. His argument, derived from the articles which he had seen, was that the Defendant could not recover service charges in the absence of a formal lease. Essentially the same point was made by Dr Stone at the partners' meeting on 20th November 2015 and in his email to Ms Brydon on 29th February 2016. In fact, I do not think that it is unfair to say that BMA Law were making much the same point in their letter of 23rd October 2018. That letter does refer to payments of rent being interpreted as inclusive of rent, but the essential argument remained the same; namely that there was no documented lease and no separate contractual obligation to pay a service charge.

203. It seems to me that there is an important difference between the argument that the Valley View Tenancy contains no obligation to pay a service charge, and the argument that the obligation to pay rent under the Valley View Tenancy is an obligation to pay a rent which is treated as all-inclusive, so that nothing further can be required to be paid under the Valley View Tenancy. The first argument is the argument which was put by the Valley View Partners and their former solicitors, to the extent that there was a challenge to the ability of the Defendant to recover service charges. The second argument seems to me to be a different argument, which has surfaced in the Valley View action.

204. In any event, neither argument was ever accepted by the ENH PCT or by the Defendant. In summary, the second obstacle to the argument that the rent payable under the Valley View Tenancy is all-inclusive is that the history of the dealings between the parties is inconsistent with any argument that the parties can be taken to have intended that the rent should be all-inclusive.

205. Third, and by way of an associated obstacle, there is evidence that the Valley View Partners were well aware both that they had a service charge liability in respect of the Cuffley Health Centre, and that they would have a service charge liability in respect of the Valley View Premises. The Cuffley Lease contained

provisions for the payment of a service charge. The draft lease in respect of the Valley View Premises also contained provisions for the payment of a service charge; specifically 92.45% of the service charge payable by the ENH PCT to the Doshis under *"the Headlease"*, which was defined to mean the Valley View Underlease.

206. In her witness statement, at paragraph 17, Dr Taylor said this:

> *"The Partnership assumed that the occupation of Valley View would be on terms similar to those of Cuffley. We were a tenant at Cuffley, but there was no written lease to start with and even when there was a written lease, there were no discussions nor demands nor bills for any service charges, and nor did we pay the PCT for any service charges."*

207. This statement was part of an attempt by Dr Taylor, in both her written and oral evidence, to downplay the significance of service charges and to claim lack of understanding of the situation concerning service charges. Essentially, Dr Taylor claimed that she only became aware of the question of service charges when Ms Brydon came on the scene and started to make demands for payment of service charge items.

208. I am not able to accept this evidence, in respect of which there are a number of difficulties.
    (1) The Cuffley Lease contained service charge provisions. It is true that the ENH PCT did not levy these service charges until the two years prior to 2011, but Dr Taylor confirmed in the course of cross examination (in answer to a question from myself) that she was aware that the Cuffley Lease included provisions for the payment of a service charge.
    (2) The draft lease to be entered into in respect of the Valley View Premises contained provisions for the payment of a service charge. The Valley View Partners had solicitors (GH) acting for them in respect of this draft lease and, on 30th November 2010 Mr Hemmings-Portas was able to inform Mr Harding that he was in a position to provide final comments on the draft lease. Dr Taylor herself confirmed in cross examination that, by 2011, the ENH PCT had spent four years trying to conclude the terms of the sub-underletting of the Valley View Premises to the Valley View Partners. I find it impossible to accept that GH did not, at some stage, discuss the provisions of the draft lease, including the service charge provisions, with their clients, the Valley View Partners.
    (3) Dr Taylor accepted in cross examination that she was aware of the existence of the Valley View Underlease, and that the Doshis were providing a range of services to the Valley View Building, for which the ENH PCT was paying.
    (4) It is clear that service charges were a major source of concern to the Valley View Partners. As Ms Fogden's email of 11th January 2011 records, the first matter raised at the meeting that day, by Dr Taylor, was the issue of service charges. Thereafter the issue of service charges was repeatedly raised between the parties, and also surfaces as an issue of concern within the internal documents of the Valley View Partners. I appreciate that this meeting took place in 2011, but I cannot accept that the Valley View

Partners gave no thought to service charges prior to Ms Brydon coming on to the scene.

(5) Dr Taylor drew up a business plan for the re-organisation of the medical services provided through the Cuffley Health Centre and the Valley View Premises. I believe that this business plan was drawn up at or around the time that the Valley View Partners gave notice to determine the Cuffley Lease. It contained the following statement:

> *"In addition it has become apparent that the Service Charges at Cuffley Village Surgery are too expensive for the Practice to continue to be able to pay. Although we have not finalised a lease at the Valley View Surgery we understand the services charges there will be considerably less due to the fact that it is a modern building with modern technology."*

I appreciate that this was not, at least as I understand the position, a document drawn up in 2007, at the time of the move to the Valley View Premises but, again, I cannot accept that the Valley View Partners gave no thought to service charges prior to Ms Brydon coming on the scene.

209. I do not think that Dr Taylor was being dishonest in this part of her evidence. I do think that her concern to defend the case of the Valley View Partners that their rent was all inclusive coloured her recollection of the extent to which the Valley View Partners understood the service charge position, both in respect of the Cuffley Health Centre and the Valley View Premises, from the time when they moved into the Valley View Premises. I find the following facts:

(1) At the time when the Valley View Partners moved into the Valley View Premises they were aware that the Cuffley Lease contained provisions for the payment of a service charge.

(2) At the time when the Valley View Partners moved into the Valley View Premises they assumed that their occupation would be on terms similar to those at the Cuffley Health Centre. This was the evidence of Dr Taylor, and I accept it.

(3) At the time when the Valley View Partners moved into the Valley View Premises they were aware that they could expect to be charged a service charge in respect of their occupation of the Valley View Premises. I cannot accept the evidence of Dr Taylor, in cross examination, to the contrary.

(4) At some stage prior to January 2011, the Valley View Partners were made aware by their solicitors (GH) that the draft version of what was intended by the parties to be the formal sub-underlease of the Valley View Premises contained provisions for the payment of a service charge.

210. The Claimants sought to defend this part of the case by pointing me to the absence of reference to service charges at the time when the Valley View Partners took up occupation of the Valley View Premises. In particular, I was referred to a spreadsheet of calculations which took up some time in the re-examination of Dr Taylor, and was described as part of a business plan, prepared at the time of the decision to move to the Valley View Premise, with the ENH PCT. I understood this spreadsheet actually to be a set of projections prepared by the accountant to the practice. The relevant point is that the spreadsheet makes no specific reference to a service charge being payable in respect of the Valley View Premises. The spreadsheet was said only to refer to rent. I have to say that I did

not find this document particularly helpful. Without further explanation from the person responsible for its preparation, I would be reluctant to draw any material conclusions from this document. By way of example, the rental figure shown in the spreadsheet is £94,000 per annum, but there is other evidence demonstrating that the initial rent payable under the Valley View Tenancy was treated as being £71,460.00 per annum. In any event, I am not prepared to accept this document as evidence that the Valley View Partners did not, at the time when they moved into the Valley View Premises, expect to have to pay service charges in respect of the Valley View Premises.

211. Drawing together all of the above discussion, it seems to me that the evidence clearly does not support, and in fact contradicts any argument that the parties can be taken to have intended that the rent payable under the Valley View Tenancy should be all-inclusive. It is clear that the parties never had this intention.

212. I therefore conclude that the rent payable under the Valley View Tenancy is not an all-inclusive rent.

213. This conclusion renders it necessary to consider whether the Valley View Tenancy does contain an express or implied obligation to pay for services and, if so, what services.

214. In closing submissions the Claimants conceded that they accepted, if they were wrong about the all-inclusive rent, an obligation to pay a sum equal to the amount the Defendant was obliged to pay to the Doshis pursuant to the Defendant's service charge obligations under the Valley View Underlease. As set out in the Defendant's draft order for Valley View, and as accepted by the Claimants, this would constitute an implied obligation in the Valley View Tenancy, imposed upon the Valley View Claimants, as tenants, to pay to the Defendant (as landlord), on demand, a sum equal to the amount that the Defendant is from time to time liable to pay its landlord (**"the Superior Landlord"**), pursuant to clause 23 of the Valley View Underlease, in respect of services provided by the Superior Landlord under the Valley View Underlease.

215. A similar concession was not made with respect to the one service which I have found that the Defendant is obliged to provide under the terms of the Valley View Tenancy; namely the servicing and maintenance of the boilers which serve the Valley View Premises.

216. It seems to me that the concession which was made by the Claimants in this context, in terms of the obligation effectively to indemnify the Defendant in respect of its own service charge obligations under the Valley View Underlease, was correctly made. It also seems to me that the Valley View Tenancy should be treated as containing an implied obligation on the part of the Valley View Claimants, as tenants, to pay, on demand, the reasonable costs incurred by the Defendant in the servicing and maintenance of the boilers which serve the Valley View Premises. In terms of the actual identification of this sum, I accept the wording used in the Defendant's draft order, which refers to:

> *"A sum equal to the costs reasonably incurred by the Defendant in carrying out works (whether planned or reactive) of repair, maintenance, servicing,*

replacement or renewal of the boiler at the Property [the Valley View Premises], *including its associated conduits, cables and media and in taking such other steps as may be necessary to ensure that the Property continues to enjoy hot water and space heating."*

217. Given the very limited area of dispute in this context, I express my reasoning in support of the conclusions set out in my previous paragraph very briefly.

218. So far as the obligation to meet the service charge costs payable by the Defendant is concerned, my finding would have been, if the issue had not been conceded, that the parties must be taken to have intended that the Valley View Partners would meet the costs of services provided for the benefit of the Valley View Building, in so far as the ENH PCT was required to meet those costs under the terms of the Valley View Underlease. Otherwise the Valley View Partners would, in this respect, effectively have enjoyed a free ride in the Valley View Premises at the expense of the ENH PCT and, subsequently, the Defendant. While I accept that this was not an issue which the parties appear to have addressed in specific terms, at the time of the original move to the Valley View Premises, it seems to me, in circumstances where the rent was not all-inclusive, that the parties cannot have intended that the costs of services, provided for the benefit of the Valley View Building, should be left for the ENH PCT to meet. This analysis is also consistent with the subsequent conduct of the Valley View Partners, in terms of their dealings with the ENH PCT and the Defendant, once the question of service charges had been raised.

219. My reasoning is essentially the same in relation to the costs of the boilers, as those costs are identified above. The evidence demonstrates that the Valley View Partners have treated the ENH PCT and the Defendant as the party responsible for these boilers. I have also found that the Defendant is under a formal obligation (to the Valley View Claimants and, possibly, also to the Doshis) to maintain and service the boilers or, possibly more accurately, the boiler system. The benefits of a functioning boiler system are enjoyed by the Valley View Partners, as the occupants of the Valley View Premises. As such, it would be perverse if the parties were not taken to have intended that the Valley View Partners, as tenants under the Valley View Tenancy, were not required to meet the reasonable costs of the Defendant's obligation to maintain the boiler system.

220. In summary therefore, my conclusions in respect of the questions considered in this section of this judgment are as follows:
    (1) The rent payable under the Valley View Tenancy is not an all-inclusive rent.
    (2) The Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants under the Valley View Tenancy, to pay to the Defendant (as landlord), on demand, a sum equal to the amount that the Defendant is from time to time liable to pay its landlord (the Superior Landlord), pursuant to clause 23 of the Valley View Underlease, in respect of services provided by the Superior Landlord under the Valley View Underlease.
    (3) The Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants, to pay, on demand, the reasonable costs

incurred by the Defendant in the servicing and maintenance of the boiler system which serves the Valley View Premises. In terms of the actual identification of these costs, I accept the wording used in the Defendant's draft order for Valley View.

(iv) Valley View – Are management costs recoverable?

221. I must start by giving a brief explanation of what is meant by management costs. The principal explanation of management costs was given by one of the Defendant's contextual witnesses, Adrian Smallwood. Mr Smallwood is a qualified surveyor, and was employed by the Defendant as the Principal National Asset Manager from April 2014 to November 2017.

222. Mr. Smallwood explained in his evidence that management costs, or management fees as he called them, were introduced as a charge by the Defendant in 2016/2017. The object of the exercise was said to be the recovery of the Defendant's own internal costs of managing the provision of services to properties on its estate. The way this was done was to apply percentage figures to the costs of services provided to each property within the Defendant's estate. Two different percentages were applied:
    (1) A figure of 5% was applied to the costs of rates and utilities and to what were referred to as *"pass through"* costs; meaning the costs charged to the Defendant by a superior landlord which were then passed on to the Defendant's own undertenant. Valley View provides an example of this in the service charges charged to the Defendant by the Doshis, pursuant to the terms of the Valley View Underlease, which are then passed on by the Defendant to the Valley View Partners, pursuant to what I have found to be a term of the Valley View Tenancy.
    (2) A figure of 10% was applied to the costs of all other services delivered to the relevant premises; being both services supplied by the Defendant itself, and services provided by third parties the costs of which were charged to the relevant tenant by the Defendant.

223. Mr. Smallwood was only employed by the Defendant up to November 2017. The position in respect of management costs was however updated and further explained by another of the Defendant's contextual witnesses, Mark Smith, who is the Chief Financial Officer of the Defendant. Mr. Smith gave evidence of the different categories (Hard FM/Soft FM/Utilities) which the Defendant uses to classify the services provided to its properties but, as I understood Mr. Smith's evidence, the Defendant continues to use the same 5% and 10% percentages explained by Mr. Smallwood in charging or seeking to charge management costs to its tenants, with the same split in the application of each of these percentages to services.

224. The essential position is therefore as follows. If one assumes that the direct cost of services provided to a particular property for a particular service charge year is £50,000 (assuming a right of recovery of all the relevant costs from the relevant tenant), the sum demanded of the tenant by the Defendant for that service charge year will not be limited to £50,000. The sum demanded will be increased by what the Defendant says are its own management costs of delivering those services. The relevant increase will be calculated by applying the 5% and 10% percentages.

So, if one assumes that £10,000 out of the £50,000 comprises the costs of utilities and other *"pass through"* costs, the figure of £10,000 will be increased by 5% (£500). If one also assumes that the remaining £40,000 comprises the direct costs of providing services to the relevant property, either by the Defendant providing the service itself or by the Defendant contracting with a third party for the delivery of the relevant service, the figure of £40,000 will be increased by 10% (£4,000). The overall result will be a service charge bill for the relevant year of £54,500, of which £4,500 will be what the Defendant says are its recoverable management costs.

225. Mr. Smith included in his witness statement an analysis based on the figures for the Defendant's 2022/2023 budgeting process. What the analysis purported to show was that the Defendant's budgeted total direct costs of service delivery for the 2022/2023 service charge year amounted to £217.8 million. This would in turn generate management fees (applying the 5% and 10% percentages as appropriate), of £19.2 million. The analysis purported to demonstrate however that the actual management costs anticipated to be incurred by the Defendant in delivering these services amounted to approximately £27.7 million. This was said to justify the percentages which the Defendant is using for the purposes of charging management costs/fees. I make no finding that this analysis is correct. If it requires to be investigated, such investigation will be for Trial 2. I make specific reference to the analysis in order to identify a ground on which the Defendant defends the percentages which it uses in calculating management costs.

226. With this explanation of management costs in place, I return to the question of whether management costs are recoverable from the Valley View Claimants under the terms of the Valley View Tenancy. I stress that I am addressing this question as an in principle question. I am deciding whether management costs are, in principle, recoverable under the terms of the Valley View Tenancy. If management costs are, in principle, recoverable, questions of whether there are any particular objections to the amount of the management costs which are claimed from the Valley View Claimants and/or to their method of calculation are for Trial 2.

227. I start with the relevant law. I was referred by the parties to a number of authorities on the recoverability of management costs through service charges. I was also referred to the discussion of management charges in Service Charges and Management (5th Edition) produced by Tanfield Chambers. All of this material was helpful to my decision, but it seems to me that it is only necessary to make specific reference to one of the authorities, which is the decision of Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber), in *Waverley Borough Council v Kamal Arya* [2013] UKUT 0501 (LC), which contains an invaluable review of the relevant authorities.

228. *Waverley* was a residential service charge case. The respondent was the tenant of a maisonette situated within a residential estate owned by the respondent landlord. The tenant held the maisonette on a long lease. The tenant applied to what was then the Leasehold Valuation Tribunal for a determination as to whether certain charges levied by the appellant landlord over a number of years were

payable under the terms of the lease. The charges in question comprised a standard charge for administration of the landlord's leasehold services, levied at a flat rate of £30 a year, increased to £35 a year over the relevant period, and a flat rate addition of £17.50 reflecting costs incurred by the landlord in connection with managing and administering the insurance of the property in which the maisonette was located.

229. It is important to note that the principal issue which arose in *Waverley*, and generated the appeal to the Upper Tribunal, was whether the LVT had been right to decide that the landlord could not recover a proportion of its central management, administration and overheads costs from the tenant where, insurance apart, it had not in fact provided any services to the relevant property over the relevant years. The other issue on the appeal was whether the LVT had been right to decide that the landlord was not entitled to add an administration charge to the cost of the insurance premium.

230. It is also useful to have in mind the principal clause in the lease in *Waverley*, which was said to permit the recovery of the flat rate figure of £30/£35. In its most material part the relevant clause provided as follows:

> *"(3) To pay to the Council by way of additional rent a yearly sum equal to a proportionate part (calculated as mentioned below) of the costs, expenses and outgoings which the Council have incurred in the period of 12 months up to the preceding 1 April in each year in the repair, maintenance and renewal of the building of which the flat forms part and the provision of services undertaken by the Council (whether or not the tenant actually utilises those services) and of insuring the building subject to the following terms:"*

231. After setting out the relevant provisions of the lease, and the facts of the case, the Deputy President proceeded to his review of the relevant authorities. Following this review, the Deputy President helpfully summarised the law in the following terms, at [30] (the underlining is my own):

> *"30. It is clear from these authorities that, in principle, the costs incurred by a local authority (or by any other landlord) in arranging for the provision of services, and managing their delivery, is properly regarded as part of the cost of providing the service which may be recovered from its tenants <u>through an appropriately framed service charge covenant</u>. The same is true of the overhead costs incurred in connection with the management and provision of services. In both cases <u>it is necessary to respect any limits which the parties may have imposed on the categories of expenditure to which the service charge may relate</u> (as in Norwich)."*

232. The Deputy President then went on to deal with the question of the relationship between management costs and the services in respect of which they are charged, and the method of calculation, at [31] to [34]:

> *"31. In relation to overheads and indirect costs it will also be necessary to consider, as a question of fact, whether the relationship between the costs sought to be recovered and the services to which they are said to relate is sufficiently close to fall within the terms of the lease. The further from actual compliance with the landlord's obligations the incurring of the cost*

or expense lies, the more difficult it may be to treat it as part of the cost of compliance. The language of some leases may permit a more generous attribution of indirect costs to the service charge than that of others.
32. The cases also show that different approaches are possible to the calculation and apportionment of charges for management and indirect costs.
33. In some cases a fixed percentage has been added to the direct cost of the service (15% in the Brent case); in others the expenditure of an authority's relevant departments has first been analysed to identify the proportion referable to the management of its residential leasehold estate, and that proportion has been divided by the number of leaseholders to produce a contribution which all are required to pay (as in Norwich); a third approach has been annually to identify the percentage of all expenditure on the leasehold estate represented by administration and overheads, and then to apply that percentage to the cost of the services provided to the particular estate, block or dwelling (as in Southwark).
34. In South Tyneside Council v Hudson [2012] UKUT 247 (LC) the Tribunal (His Honour Judge Huskinson) allowed an appeal by the council in relation to the apportionment of the costs incurred by the arms length management company ("STH") responsible for managing the whole of its tenanted and leasehold housing stock. The council's approach had been to attribute to its leasehold properties a proportion of the total management fee which it paid to STH for managing its entire estate; it then deducted a percentage for costs incurred in respect of specific properties (for example in dealing with requests for consent) which were recoverable from individual lessees; finally, it divided the resulting sum equally amongst all its leaseholders to arrive at a cost per flat. The council's standard lease expressly permitted it to recover the costs of managing the building of which the demised premises formed part, whereas its approach to apportionment made each leaseholder responsible for an equal share in the cost of managing every building in its residential portfolio. The Tribunal found nothing impermissible in that approach, and explained its reasons at paragraphs 40 and 41, as follows:"

233. For the purposes of these five actions, I derive the following principles from the Deputy President's invaluable summary of the law:
    (1) There is nothing inherently objectionable in the Defendant seeking to recover its own internal management costs as part of the recoverable service charges (if any) for a particular set of Premises.
    (2) Such recovery can however only be made, subject to any other defences which may be available to the tenant, if the relevant lease or tenancy contains a provision for the recovery of costs incurred in respect of the relevant set of Premises which is sufficiently wide to include the landlord's internal management costs as part of the recoverable costs.
    (3) As part of the question of whether the relevant provision is sufficiently wide to encompass the recovery of internal management costs, it is legitimate to consider, as a question of fact, the nature of the relationship between the costs sought to be recovered and the services to which they are said to relate. If the relationship is a distant one, that may cause the relevant costs to fall outside the scope of the relevant provision.

(4) Subject to the point just made, there is no prescribed method for the calculation and apportionment of management costs. In principle, different methods can be used to calculate and apportion such management costs. The central question remains whether the management costs fall within the scope of the provision, in the relevant lease or tenancy, which is said to permit their recovery.

234. In this context I accept the point which was made to me by the Defendant, which is that it is wrong to treat management costs, at least as they are claimed in the five actions, as a separate item of services, equivalent to items such as cleaning, or gardening, or security. I accept that, in relation to management costs, the question is whether they are recoverable as part of the cost of delivering services so that, using the examples I have just given, the question would be whether management costs associated with the provision of cleaning, or gardening, or security services can be recovered as part of the cost of delivering those services.

235. Turning specifically to Valley View, I have found that the Valley View Tenancy does contain two provisions for the recovery of costs in respect of the Valley View Building. First, the Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants under the Valley View Tenancy, to pay to the Defendant (as landlord), on demand, a sum equal to the amount that the Defendant is from time to time liable to pay its landlord (the Superior Landlord), pursuant to clause 23 of the Valley View Underlease, in respect of services provided by the Superior Landlord under the Valley View Underlease. Second, the Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants, to pay, on demand, the reasonable costs incurred by the Defendant in the servicing and maintenance of the boiler system which serves the Valley View Premises. In terms of the actual identification of these costs, I have accepted that they are described in the following terms, in the Valley View Tenancy.

> *"A sum equal to the costs reasonably incurred by the Defendant in carrying out works (whether planned or reactive) of repair, maintenance, servicing, replacement or renewal of the boiler at the Property* [the Valley View Premises], *including its associated conduits, cables and media and in taking such other steps as may be necessary to ensure that the Property continues to enjoy hot water and space heating."*

236. So far as the first of these provisions is concerned, I cannot see that it is wide enough to permit the recovery of management costs. The relevant obligation imposed upon the Valley View Claimants, as tenants, is not to pay for the costs incurred by the Defendant in the provision of the services referred to, but rather to pay the sum which the Defendant has to pay to its landlord. The obligation seems to me to be akin to an obligation to indemnify the Defendant against that which it has to pay the Doshis. I cannot see that the terms of this obligation permit the recovery of management costs incurred by the Defendant in the business of passing on to the Valley View Claimants the costs which it has to pay to the Doshis. The limits of what has to be paid are defined by reference to what has to be paid to the Doshis, not by reference to costs and expenses incurred by the Defendant.

237. Turning to the second of these provisions, it seems to me that it is wide enough to permit the recovery of management costs. What can be recovered is a sum equal to the costs reasonably incurred by the Defendant in carrying out works (whether planned or reactive) of repair, maintenance, servicing, replacement or renewal of the boiler and associated items. Applying *Waverley*, it seems to me the costs reasonably incurred by the Defendant are quite capable of including the Defendant's own management costs, in terms of organising and managing the relevant works which fall within the terms of this provision. The relevant costs, so far as this provision is concerned, have to be reasonably incurred by the Defendant in carrying out the relevant activities. In principle, I see no reason why these costs cannot include the Defendant's own internal management costs of carrying out these activities, if the internal management costs are reasonably incurred.

238. Nor can I see that it is, at least in principle, objectionable for the Defendant to calculate these management costs by adding a percentage (which I assume would be, or at least would generally be 10%) to this category of expenditure. The Defendant owns a very substantial portfolio of properties. It strikes me that it would be very difficult, if not impossible, for the Defendant to isolate a set of its internal management costs for a particular set of premises, let alone, as would be required in relation to the Valley View Premises on the basis of my decision, to a particular item of services provided to a particular set of premises. I cannot see that the Defendant's method of calculating internal management costs results in a distance between the relevant item of services (boiler repair and associated items) and the management costs claimed in connection with that item of services which is too great to permit the management costs to be capable of qualifying as costs reasonably incurred, within the meaning of the relevant provision in the Valley View Tenancy.

239. The Claimants launched a sustained attack on the Defendant's method of calculating management costs. They argued that no evidence had been produced as how the costs are calculated at 5% and 10%. They also argued that the application of a percentage to calculate the management costs did not accord with industry best practice, and had been accepted by the Defendant not to accord with industry best practice. I was referred, in particular, to the RICS codes of practice for service charges in commercial properties and to the RICS professional statement for service charges in commercial property, which have variously been in place in the years since the incorporation of the Defendant. The point was made that these documents required management fees to be set on a fixed price basis, rather than being calculated as a percentage of expenditure. Indeed, it is fair to point out that paragraph 12 of the Consolidated Charging Policy for 2017/2018, contains the following acknowledgment by the Defendant:

> *"It is understood that the basis for NHSPS management fee calculation and charging is quite "binary", and does not yet fully reflect the more nuanced approach seen as best practice in the broader commercial property market. Closer alignment with industry best practice should result in a more equitable basis for calculating management fees payable by occupiers and their commissioners so you will be pleased to find proposals to move in that direction in the Consultation Paper at Annex C (2)."*

240. So far as the first of the above arguments (no explanation of the calculation) was concerned, I do not think that it is correct. The method which the Defendant uses to calculated management costs was explained by Mr. Smallwood, and Mr Smith, and can be found further explained in the Defendant's documents. I do not think that the basis for charging the management costs has been left unexplained.

241. So far as the second of the above arguments is concerned, it seems to me that it belongs in Trial 2. So far as Trial 1 is concerned, I have decided that management costs are, in principle, recoverable in relation to a particular item of services provided to the Valley View Premises; namely boiler repair and associated items, as more particularly described in the relevant provision which I have found to be contained in the Valley View Tenancy. I have also decided, applying the test identified by the Deputy President in *Waverley*, at [31], that there is not such a distance between this item of services and the management costs claimed in connection with this item of services as to disqualify the management costs from being recoverable. These decisions do not however necessarily conclude the argument over the recoverability of these management charges as part of the costs of this item of services. I will not make the mistake of trying to anticipate every argument which might arise in Trial 2, but I do note that the costs recoverable under the relevant provision of the Valley View Tenancy must be reasonably incurred. In theory, it might be argued that the management costs claimed did not qualify as having been reasonably incurred. In theory, a point relevant to that argument might be whether the method of calculating management costs used by the Defendant does or does not accord with industry best practice. I express no views either on this argument or on this particular point. My point is that the question of whether the Defendant's method of charging management costs does or does not accord with industry best practice, if it is pursued, seems to me to belong in Trial 2, not in Trial 1.

242. In this context I also note, in any event, that the Defendant's draft order in Valley View seeks a declaration that the Valley View Claimants are liable to pay *"A sum equal to the Defendant's reasonable costs of managing the provision of the services referred to in sub-paragraphs (i) to (iii) above"*. While I have found that the ability to recover management costs is limited to only one item of services, in the case of Valley View, the Defendant is not seeking a declaration that it is entitled to recover management costs calculated in accordance with its existing method of calculation. Instead the Defendant is seeking to establish a right to reasonable management costs. I have decided that the management costs in respect of one item of the services are, in principle, contractually recoverable. If there is a dispute over whether they are reasonable costs, that will be for Trial 2.

243. I therefore conclude as follows in relation to the question of whether management costs are recoverable under the terms of the Valley View Tenancy.
    (1) Management costs are, in principle, contractually recoverable under the terms of the Valley View Tenancy, but only in relation to one item of services.
    (2) Management costs are, in principle, contractually recoverable as part of the costs reasonably incurred by the Defendant in carrying out works (whether planned or reactive) of repair, maintenance, servicing, replacement or renewal of the boiler at the Valley View Premises, including its associated

conduits, cables and media and in taking such other steps as may be necessary to ensure that the Valley View Premises continue to enjoy hot water and space heating.

(3) This is not a decision that management costs are in fact recoverable in respect of the item of services identified in my previous sub-paragraph, in relation to the service charge years which are the subject of the counterclaim in Valley View. There may be other defences to the claim for these management costs which fall to be considered in Trial 2, including in relation to whether the management costs qualify as reasonable costs.

Coleford - relevant history

244. I can take the relevant history more shortly than in relation to Valley View. The Coleford Premises have been occupied by the Coleford Partners for many years, going back at least to 1990. The occupation of the Coleford Building by the Coleford Partners has been shared with other medical related occupiers. There is no formal lease in existence, but it is common ground that the Coleford Partners have an implied periodic (quarterly) tenancy of the Coleford Premises. The extent of the Coleford Premises (the premises occupied by the Coleford Partners from time to time) has been subject to increases over the years. The Coleford Partners took on additional premises within the Coleford Building in or around 2008, in 2012, and in 2018.

245. The Claimants called two witnesses who gave evidence specific to Coleford. They were Dr Barbara Cummins, one of the Coleford Claimants, who has been a Coleford Partner since 1998, and Bridget Docking, who is the practice manager of Coleford Family Doctors and has been in this role since 2001. Both witnesses were therefore well-placed to explain the relevant history of Coleford.

246. Ms Docking explained in her witness statement that, during the years when the GPCT was the landlord at Coleford, it provided all the services required at the Coleford Premises. Ms Docking gives a non-exhaustive list of these services at paragraph 9 of her witness statement, in the following terms:

> *"When the G PCT was landlord, it provided all services required at the Premises. This included maintenance, cleaning, laundry, internal and external works (both minor and major), grounds maintenance and garden services, pest control, window cleaning, painting and decorating, portering services, fire safety and fire equipment checks, water / legionella checks, clinical waste and gritting. The gas, rates, water and electricity were all arranged by the G PCT as well. Everything was arranged by the G PCT."*

247. In cross examination Ms Docking accepted that the GPCT essentially did everything that needed doing at the Coleford Premises. In her words *"they treated it as if it was their building and they were responsible for everything."*.

248. In terms of charging however, the GPCT did charge for the services which they provided. Paragraphs 8 and 9 of Ms Docking's witness statement list a series of payments, from 2002/2003 through to 2014/2015, which, subject to some corrections which Ms Docking accepted in cross examination, the Coleford Claimants said had been paid, to the GPCT and then to the Defendant, in addition to rent. Ms Docking confirmed in her witness statement that the invoices sent out

by the GPCT would be paid, without argument. Between 2002 and 2009 the GPCT sent out invoices which did not have an accompanying breakdown. Ms Docking's evidence in cross examination was that the figures set out in these invoices were for non-reimbursable service charges only. From 2009/2010 service charge statements were sent out which contained a breakdown of reimbursable and non-reimbursable service charges. The Coleford Partners were required to pay both categories of service charge, but Ms Docking explained in cross examination that the GPCT met, sometimes in advance, the costs of paying the reimbursable service charges, so that the relevant funds effectively moved in a circle. What these service charge statements also showed was that the Coleford Partners were being charged a proportion of the total cost of the services provided to the Coleford Building. The percentage proportion was 57.4%. I believe that it was common ground between the parties that this percentage reflected the proportion of the Coleford Building which the Coleford Partners occupied during the relevant years when this percentage was used.

249. By reference to the Coleford Particulars of Claim the Coleford Partners paid to the Defendant non-reimbursable service charges of £23,928.46 for the 2013/2014 service charge year, and £18,448.92 for the 2014/2015 service charge year. Thereafter the Coleford Partners did not pay any non-reimbursable service charges, but did pay the Defendant rent and rates; both of which were reimbursable payments by virtue of the 2013 Directions. Ms Docking also explained in her witness statement that NHSE had informed the Coleford Partners that NHSE had not been reimbursing the Coleford Partners for water charges, which are a reimbursable expense. Ms Docking was unsure how this situation had come about.

250. The Defendant called, as one of its witnesses specific to Coleford, Colin Pugh, who is a Technical Services Manager with the Defendant. Mr Pugh has been in this role since 2017, and was previously a Service Delivery Manager for the Gloucestershire area, in which capacity Mr Pugh was directly involved with the Coleford Building between 2014 and 2017. Mr Pugh described in his witness statement what appears to have been a somewhat problematic handover of responsibilities for services to the Defendant, in the sense that the Defendant inherited a large estate of properties to manage, without either the resources or the information to ensure a smooth transition. In particular, Mr Pugh explains that his immediate predecessor in his role, a Mr Eves, had continued to engage the same party as previously to provide services to the Coleford Building. Mr Pugh identified the party which delivered these services as Gloucestershire Care Services NHS Trust ("GCS"). Prior to the vesting of the Coleford Building in the Defendant, GCS had been responsible for the provision of services to the Coleford Building. Following the vesting, Mr Eves retained GCS to provide the same services as before. As from 2015 this changed, and the Defendant took the delivery of services to the Coleford Building in house, contracting out specific services as necessary.

Coleford – discussion and determination of the issues

(i) Coleford – Is the Defendant obliged to continue to provide services under the Coleford Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the Coleford Amended Defence and Counterclaim?

251. While it is common ground that the Coleford Claimants have a periodic tenancy of the Coleford Premises (the Coleford Tenancy), there is no document which contains or directly evidences the terms of the Coleford Tenancy. In supplying the terms of the Coleford Tenancy the test, as stated in *Javad*, is therefore the same as I have identified in relation to the equivalent exercise in Valley View. What terms can the parties be taken to have intended to apply, bearing in mind what was agreed and bearing in mind all the surrounding circumstances?

252. In terms of an obligation to provide services the parties were agreed that the Coleford Tenancy contains a landlord's obligation to provide services, but were not agreed on the content of that obligation. In paragraph 3 of the Defendant's draft order the terms of the obligation are as follows:

> *"Under the Tenancy, the Defendant, as landlord, is obliged to continue to provide the services referred to in paragraph 1 above unless the Defendant reasonably concludes that it is not necessary or appropriate to continue to provide one or more of those services at the Property."*

253. The Claimants submitted that the obligation was in much simpler terms; comprising only the obligation to continue to provide services, without the proviso introduced by the word *"unless"* in the Defendant's version. Effectively therefore, and subject to the question of what was meant by the reference to *"services"*, the Claimants accepted the Defendant's version of the obligation, but only up to, and not including the proviso. In closing submissions the Defendant made it clear that its fallback argument, if I was to find that there was no such proviso, was that I should find that there was no obligation at all.

254. So far as *"the services"* were concerned, there was no consensus between the parties as to the identity of the services which were the subject of the landlord's obligation to provide the services, if there was such an obligation. The question of the identity of these services overlapped with the same question in relation to the tenant's obligation to pay for services. It seems to me therefore that the correct approach to the question of what, if any, landlord's obligation to provide services is contained within the Coleford Tenancy is best taken in two stages. In this section of the judgment I will consider whether there is such an obligation. If I conclude that there is such an obligation, I will consider the question of what services are the subject of that obligation when I come to consider the question of the tenant's obligation to pay for services.

255. I can take the question of whether there is such an obligation in the Coleford Tenancy very shortly. The Claimants say that there is such an obligation, but that it is absolute. The Defendant says that there is such an obligation, but that it is qualified. The evidence of the dealings between the parties in relation to Coleford does not disclose any evidence of an actual agreement between the parties that the landlord, being first the GPCT and then the Defendant, was under an absolute obligation to provide services. I refer back to the helpful evidence of Ms Docking on the history of her dealings with the GPCT. As she explained *"they* [GPCT] *treated it as if it was their building and they were responsible for everything."*. The GPCT would raise service charges, and the Coleford Partners would pay their apportioned share of those charges. This continued until the Coleford Partners stopped paying the non-reimbursable service charges, after the 2014/2015 service

charge year. The history of the dealings between the parties discloses, and I so find, that the GPCT would make the decisions as to what services were required for the Coleford Building, and did not treat itself as subject to an unqualified obligation to provide a list of specified services. I find that this did not change when the Defendant took over as landlord of the Coleford Partners.

256. In these circumstances I do not think that the parties can be taken to have intended that the Coleford Tenancy should contain an unqualified obligation on the part of the landlord to provide a specified list of services. It seems to me that the parties can be taken to have intended that the Coleford Tenancy should contain an obligation on the part of the landlord to provide services, but in terms which gave the landlord ultimate control over the particular services provided. Indeed, without such a qualification to the obligation, the landlord could find itself in the position of being subject to a contractual obligation to provide a particular service, in circumstances where the relevant service was not reasonably required or could not, for some good reason, be provided.

257. The process of determining what the parties can be taken to have intended, in relation to the terms of the Coleford Tenancy, is necessarily an imprecise one. There is no evidence that the parties ever agreed to the actual wording of the proviso which is set out in the Defendant's draft order. This seems to me however to miss the essential point, which is that the wording of the obligation contended for by the Defendant, including the proviso, does, in my view, best reflect what the parties must be taken to have intended, in terms of the landlord's obligation to provide services to the Coleford Building.

258. I therefore conclude that the Defendant is obliged to continue to provide services under the Coleford Tenancy. The terms of the obligation are as set out in paragraph 3 of the Defendant's draft order in Coleford, which I have set out above, including the proviso thereto. The qualification to this conclusion is that I do not decide, at this stage, the question of which services are the subject of this obligation.

(ii) <u>Coleford – Does the Coleford Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant and, if so, on what basis, and for which services?</u>

259. The Defendant's draft order sets out, at paragraph 1, the following implied obligation on the part of the Coleford Claimants to pay for services:

> *"The Claimants are liable under the Tenancy to pay on demand the Defendant's reasonable costs of services reasonably provided; including (without limitation) the following services (whether provided on a planned or reactive basis):"*

260. There then follows a non-exhaustive list of services for which the Defendant says the Coleford Claimants must pay. The Claimants accepted that the Coleford Tenancy does contain an obligation to pay for services in terms set out in the Defendant's draft order, subject to two qualifications. The first was that the Defendant did not agree the list of services referred to in the Defendant's draft order. The second was that the obligation to pay for services is subject to the

Coleford Cap. I consider this second qualification, namely whether the Coleford Cap applies, in the next section of this judgment.

261. The starting point is therefore that the Coleford Tenancy does contain an implied obligation on the part of the tenant to pay, on demand, the landlord's reasonable costs of services reasonably provided.

262. Given this common ground, I found it somewhat surprising that there continued to be an issue over the services caught by this obligation. In theory, the agreed wording of the obligation is capable of covering a wide variety of services, provided that they are reasonably provided, and provided that their cost is reasonable. Leaving aside management costs, the four items of services which were in dispute were (i) clinical supplies, (ii) feminine hygiene, (iii) insurance, and (iv) planned security services.

263. It seems to me that each of these items of services is perfectly capable of qualifying as a service reasonably provided, within the meaning of the tenant's obligation to pay for services, whether or not it has been provided as a service in the past. This seems to me to be sufficient to settle the dispute over these items of services but, in deference to the evidence and argument which I heard on these items, I will consider each item individually and, where I think it right to do so, I will make limited findings of fact which will, I hope, be of some assistances in Trial 2. These items in dispute are coloured red on the Claimants' colour coded schedule for Coleford, meaning that it is not accepted that they are services which have ever been provided to the Coleford Partners, and meaning that it is not accepted that their cost would have been recoverable, if they had been provided.

264. I start with clinical supplies. The Coleford Counterclaim pleads, at Amended Schedule 2, one instance of clinical supplies to the Coleford Premises, comprising an alleged supply of toilet roll, hand towels and disposable mops in the 2017/2018 service charge year (at a cost of £455.95). Ms Docking denied in her witness statement that this supply took place. In my view, and in this instance, the question of whether this supply did or did not take place should be left for Trial 2, if it requires investigation for the purposes of Trial 2. If however the Defendant does provide clinical supplies to the Coleford Partners, it seems to me that the costs of that supply are perfectly capable of falling within the terms of the obligation to pay for services in the Coleford Tenancy, provided of course that the reasonableness criteria in this obligation are satisfied.

265. Turning to feminine hygiene, the Coleford Reply pleads, at paragraph 11, that feminine hygiene (I assume this means feminine hygiene waste products) has been removed. It is also pleaded that this service has not been provided by the Defendant, but by cleaners or with clinical waste. In the course of the trial I heard a good deal of evidence, and quite a lot of argument over whether the feminine hygiene service had been provided as a separate service, or as part of the provision of cleaning services and/or clinical waste services, both of which were accepted to have been provided. Indeed, in closing submissions, the Claimants accepted that the costs of providing a feminine hygiene service were recoverable, but argued that this service was correctly classified as a service provided within the

envelope of cleaning and/or clinical waste services. Essentially therefore, the argument reduced to one of classification of this service.

266. It seems to me that there is, in this context, a fundamental confusion in the Claimants' position, which affects this and the other items of services in dispute. I can see that the question of whether a separate feminine hygiene service has been provided in the past may affect what is claimed by way of alleged arrears of service charges in Coleford. If however one is considering whether the costs of a feminine hygiene service are, in principle, contractually recoverable under the Coleford Tenancy, it seems to me that arguments over the past level of this service are effectively irrelevant. Such arguments do not seem to me to affect the in principle recoverability of the cost of providing a feminine hygiene service, if such a service is provided by the Defendant, either as an independent service or as part of cleaning and/or clinical waste services provided by the Defendant. Provided that the criteria of reasonableness are satisfied, the cost of providing this item of services is contractually recoverable.

267. In these circumstances I have come to the conclusion that it is not sensible for me to attempt findings of fact in relation to the history, such as it may be, of the provision of a feminine hygiene service to the Coleford Premises. I think that any such investigation is best left to Trial 2.

268. Turning to insurance, I have already noted that the Defendant claims only to be entitled to recover the cost of buildings insurance. Ms Docking accepted in cross examination that the Coleford Partners had never insured the Coleford Building or the Coleford Premises, but had only taken out their own contents and public liability insurance. If insurance is taken to mean buildings insurance, I find that the Coleford Partners have never insured either the Coleford Building or the Coleford Premises. If there is an issue as to whether the Defendant has, in the past, incurred the costs of building insurance for the Coleford Building and/or the Coleford Premises, which are the subject of the counterclaim, this will have to be investigated in Trial 2. The same goes for any questions of reasonableness which may arise. It seems to me that the cost to the Defendant of taking out buildings insurance for the Coleford Building and/or the Coleford Premises is contractually recoverable under the terms of the obligation to pay for services in the Coleford Tenancy, provided that the reasonableness criteria are satisfied.

269. Finally, there are planned security services. I found the dispute over this item the most baffling, because the Claimants accept that the Coleford Partners are liable to pay for the reasonable costs of reactive security services, if reasonably provided at a reasonable cost. There was no argument from the Claimants that the costs of planned security services were somehow inherently irrecoverable. The argument was that they were not provided by GPCT or the Defendant. There was ample evidence, from Mr Pugh and Mr Morris and from the documents which were put to Ms Docking in cross examination that planned security services were provided by both the GPCT and, in succession, by the Defendant. It would have been bizarre if the GPCT and the Defendant had provided reactive security services, such as attending when an intruder alarm went off for the wrong reason, but made no visits for routine maintenance and testing of the same alarm. I find

that the GPCT and, in succession, the Defendant did provide planned security services for the Coleford Building, in addition to reactive security services.

270. The overriding point is however the same point which has probably been laboured too much already. Whether or not planned security services were provided by the Defendant and GPCT, and I have found that they were so provided, it seems to me that their cost, if provided by the Defendant, is clearly recoverable under the terms of the obligation to pay for services in the Coleford Tenancy, provided that the reasonableness criteria are satisfied. Any more detailed argument over the level of this service which has been provided, and any more detailed findings in this context which may be required are for Trial 2. Also for Trial 2 are any issues on reasonableness in this context.

271. I therefore conclude that the cost to the Defendant of providing each of the four disputed items of services is, in principle, contractually recoverable pursuant to the implied obligation to pay for services which exists in the Coleford Tenancy, provided that the reasonableness criteria in this obligation are satisfied.

272. This then leaves the question of what should happen in relation to the list of services which is included in the version of the obligation to pay service charges which appears in paragraph 1 of the Defendant's draft order. The list can, it seems to me, include the four items of services which were in dispute, on which I have now made my decisions. This however does not deal with the problem, identified earlier in this judgment, that the Defendant's list of services is expressed to be non-exhaustive. Nor does it deal with the problem, whatever one might have hoped in this respect, that there is no list of services, the terms of which have been agreed between the parties, which can be used as the list of services, either on an exhaustive or non-exhaustive basis, for which the tenant is required to pay under the Coleford Tenancy. The use of a list of services also begs the question of whether the terms of relief granted in this respect; that is to say a declaration which identifies the tenant's obligation under the Coleford Tenancy to pay for services, should include a list at all. It might be said that the agreed terms of the obligation are sufficient, as I have set out those terms above, with no need for the addition of a list.

273. So far as the last point is concerned, it seems to me that the relevant declaration should include a list of services for which the tenant is required to pay. Such a list, even if non-exhaustive, can only help to reduce the scope for further argument. So far as the question of whether the list is exhaustive or non-exhaustive is concerned, it seems to me that the list will have to be non-exhaustive. The parties have not agreed a list of exhaustive services, and it seems to me that I am not in a position to supply such an exhaustive list. So far as the absence of an agreed list of services is concerned, my decision is that the list of services contained in paragraph 1 of the Defendant's draft order should be used.

274. This decision allows me to return to the issue which I left unresolved in the previous section of this judgment; namely what services should be listed as being the subject of the landlord's obligation to provide services, in paragraph 3 of the Defendant's draft order. It seems to me that the answer to this question should be as drafted in paragraph 3; namely that the services which the landlord is

obliged to provide are the same as those referred to in paragraph 1 of the Defendant's draft order. This means that the list of services is the same as the list of services which I have just approved. This is not ideal, because the list I have approved is non-exhaustive. As such, this list does not necessarily work as a list of the services which the landlord is obliged to provide. There may be other services for which the landlord seeks to charge pursuant to the tenant's obligation to pay for services, which are not included in the list which I have approved. If the tenant is being charged for those services this should, in theory, be mirrored by an obligation on the part of the landlord to provide the same services (subject to the proviso to the landlord's obligation which I have approved). I will leave this particular point to be addressed, if necessary, in consequential argument, following the handing down of this judgment, at the point when the declaration of the liability of the landlord to provide services comes to be finalised.

275. I therefore conclude, subject to the outstanding question of whether the Coleford Cap applies, that the Coleford Tenancy contains an implied obligation on the part of the Coleford Claimants, as tenants, to pay for the services provided by the Defendant. The obligation is an obligation to pay, on demand, the Defendant's reasonable costs of services reasonably provided, including (without limitation) the services listed in paragraph 1 of the Defendant's draft order. I also conclude, subject to the drafting point which I have left outstanding, that the services which are the subject of the Defendant's obligation to provide services are those listed in paragraph 1 of the Defendant's draft order.

(iii) Coleford - Is the obligation to pay a service charge under the terms of the Coleford Tenancy subject to the Coleford Cap?

276. The Coleford Cap has gone through a number of different incarnations in the course of the Coleford action:
    (1) Paragraph 15 of the Coleford Particulars of Claim pleads the Coleford Cap as a limit on the service charge to no more than £14,038.17 per annum. It will be recalled that £14,038.17 is what is said to have been paid by the Coleford Partners, by way of non-reimbursable service charges, for the 2012/2013 service charge year.
    (2) Paragraph 5.c.iv of the Coleford Reply and Defence to Counterclaim pleads the Coleford Cap as a term of the Coleford Tenancy that the service charges payable by the Claimants were to rise only in line with inflation.
    (3) In the Claimants' skeleton argument (specific to Coleford) for trial the Coleford Cap was identified as a term of the Coleford Tenancy that the service charge would only rise in line with inflation and with the expansion of the Coleford Premises.
    (4) At the pre-trial review it was contended that all services provided by the Defendant, including reimbursable services, were subject to the Coleford Cap. In closing submissions the Claimants acknowledged, without (as I understood the position) changing this case, that this did not align with invoices showing reimbursable items being recovered in addition to what the Claimants said was the application of the Coleford Cap.
    (5) In closing submissions the Coleford Cap was identified as limiting the Coleford Claimants' liability to no more than £14,038.14 per year (as from the last year in the PCT billing cycle; 2012/2013), rising in line only with inflation and increased occupancy. The relevant measure of inflation was

identified as CPIH (I was told this stands for Consumer Prices Index & Housing). It had earlier been identified by the Claimants, in opening submissions, as RPI (Retail Price Index). In fairness to the Claimants, I did not understand them to be arguing that a specific measure of inflation formed part of the Coleford Cap. What the Claimants were doing was to identify a suitable measure of inflation to reflect the effect of the Coleford Cap.

277. In her witness statement Dr Cummins did not give any evidence of any agreement having been reached with either the GPCT or the Defendant that the service charges payable under the Coleford Tenancy would be subject to any cap. So far as Ms Docking was concerned, she said this, at paragraph 15 of her witness statement:

> *"I noticed that the charge had sort of gradually crept up a bit over the years. I spoke to Melanie Getgood from the G PCT about this. She used to be the head of care services property. She was the one who would come and look after the Premises. I cannot recall when I spoke to her, but I queried the rise and she told me that it would just rise in line with inflation. I was okay with that; we did not have any issue as it seemed to make sense."*

278. Ms Getgood was not a witness in the trial. There was considerable dispute over her employment. The Defendant contended that she had been employed at the relevant time by GCS (Gloucestershire Care Services NHS Trust), who also occupied part of the Coleford Premises, and were used by the GPCT for the delivery of services to the Coleford Premises, and by the Defendant until 2015 when the delivery of services was taken in house. The Claimants said that she had in fact been working for the GPCT.

279. The Defendant's witnesses for Coleford gave no evidence to support the existence of any cap on service charges in the Coleford Tenancy. That said, the Coleford Cap was said to have its origins in the period of the ownership of the Coleford Building by the GPCT. One would not therefore necessarily have expected the Defendant's witnesses to be aware of the existence of an agreed cap.

280. The question of whether the Coleford Cap existed was explored further in cross examination of Dr Cummins and Ms Docking. In cross examination Dr Cummins said that the Coleford Partners had, as they understood it, a sort of informal agreement with the GPCT that the Coleford Partners would only *"be charged a certain amount and that that would be increased in line with inflation"*. She said that the understanding had existed over many years. Later in cross examination, Dr Cummins identified this understanding as an expectation which had come from past practice. Dr Cummins was asked about the accounts for the Coleford practice for the year ended April 2020, which showed a liability for non-reimbursable service charges which amounted to at least £31,000, which did not appear to be consistent with what would have been the effect of the Coleford Cap on the figure of £14,038.17, as increased from the 2012/2013 service charge year by inflation and increases in the area occupied by the Coleford Partners. Dr Cummins explained this figure by saying that it was based on what the Defendant was claiming, not what was actually due, although she also confirmed that the individual tax returns of the Coleford Partners were based upon the contents of

the accounts. It was put to Dr Cummins that no reference had been made by the Coleford Partners to any service charge cap until the pleading of the Coleford Cap in the Particulars of Claim. Dr Cummins was not able to identify any earlier occasion on which the Coleford Partners had claimed to have the benefit of such a cap.

281. It was clear from Dr Cummins' evidence, and I so find, that she was not able to assert, and was not asserting that there had been any agreement with the GPCT or the Defendant that the service charges payable under the Coleford Tenancy would be subject to any kind of cap. Ultimately, there was only the expectation spoken to by Dr Cummins, which was said to derive from past practice. I cannot however accept this part of Dr Cummins' evidence, limited as it was in its effect. I say this because there is simply no evidence of any such past practice. If one analyses the history of the amount of the service charges paid by the Coleford Partners from year to year, they show no evidence of the application of any cap. Equally the documents which evidence the history of service charge payments paid by the Coleford Partners show no evidence of the application of any cap. By way of example, the amounts charged in the six service charge years prior to the transfer of the Coleford Building to the Defendant, bear no relation to inflation. The figure of £14,038.00, which is said to be the baseline for the Coleford Cap represented an 89.5% increase from the previous year. While I do not think that Dr Cummins was being dishonest in this part of her evidence, the impression which I formed in the relevant part of the cross examination was that she was doing her best to defend the claim to the Coleford Cap, and had persuaded herself that the Coleford Partners had had the expectation of a cap when, as I find, no such expectation existed.

282. Turning to Ms Docking she was cross examined about her conversation with Ms Getgood, referred to in paragraph 15 of her witness statement. Ms Docking could not remember when her conversation with Ms Getgood took place. Ms Docking said that she had *"an understanding"* that service charges would rise and Ms Getgood *"sort of confirmed that* [service charges would rise] *in line with inflation or with inflationary charges"*. I asked Ms Docking where this understanding had come from. Ms Docking gave the following response:

> *"Well, it just seemed to make sense because they went up a little bit each year. And so inflation seems to make sense, you know? That charges are going to go up in line with inflation, and that's fair enough."*

283. Ms Docking went on to accept that she brought to the meeting with Ms Getgood an understanding that the service charge would rise with inflation, based on her belief that that was what made sense. Ms Docking also explained that the occasion when she had this conversation with Ms Getgood was not a meeting *"as such"*, but rather an informal meeting, where Ms Docking *"would have been"* querying why the service charges had gone up so much.

284. As with Dr Cummins, it was clear from Ms Docking's evidence, and I so find, that she was not able to assert, and was not asserting that there had been any agreement with the GPCT or the Defendant that the service charges payable under the Coleford Tenancy would be subject to any kind of cap. Ultimately, there was

only her understanding, which was said to be based upon what she thought made sense.

285. As with Dr Cummins however, I am not able to accept this part of Ms Docking's evidence. Ms Docking's evidence of the alleged meeting with Ms Getgood is too vague to form a reliable basis for a finding that Ms Getgood did confirm the understanding of Ms Docking. I accept that Ms Docking would have had meetings with Ms Getgood, as the person who appears to have had responsibility for the delivery of services to the Coleford Building when GCS was responsible for the delivery of services. I accept that Ms Docking may have had an understanding, at some point, that services charges appeared only to be rising in line with inflation, although it is unclear when this understanding existed. I cannot accept that any such understanding, so far as it existed, was ever confirmed by Ms Getgood. I repeat my reference to the relevant documents evidencing the history of service charge payments paid by the Coleford Partners. Those documents are not consistent with either with an understanding on the part of Ms Docking that service charges would only rise with inflation, or with any confirmation to that effect ever having been provided by Ms Getgood. As with Dr Cummins, I do not think that Ms Docking was being dishonest in this part of her evidence. The impression which I formed in the relevant part of the cross examination was that Ms Docking was also doing her best to defend the claim to the Coleford Cap, and had persuaded herself that the Ms Getgood had provided a confirmation when, as I find, no such confirmation was ever given.

286. These findings render it strictly unnecessary to deal with the question of whether Ms Getgood had authority to provide a confirmation on behalf of the GPCT or the Defendant, if one assumes, contrary to my findings, that such a confirmation was given. As however I heard a certain amount of evidence and argument on this point, I will deal with it briefly. I accept the evidence of Ms Docking that Ms Getgood was dealing with the management of services to the Coleford Building, at the time when GCS was responsible for the delivery of these services on the behalf of the GPCT and the Defendant, although it is not clear over what period of time Ms Getgood's involvement extended. I also accept, indeed I understood Ms Docking to confirm this in cross examination, that Ms Getgood worked for GCS, and not for the GPCT or the Defendant. I also accept that the documents show that the GPCT and GCS were separate legal entities.

287. It would not necessarily be surprising to find that Ms Getgood, at the time of her involvement with managing the services delivered to the Coleford Building, had authority to act on behalf of the GPCT, at least in some respects. One would expect Ms Getgood to have had some such authority, if only to be able to deal with the Coleford Partners, on behalf of the GPCT and the Defendant, in relation to the delivery of services. That said, it seems to me that the question of authority in the present context is not so easily dealt with. If it is being said that a confirmation provided by Ms Getgood to the Coleford Partners, regarding the amount of service charges which would be charged in the future, was given with the authority of the GPCT and/or the Defendant, it would be necessary for the Claimants to plead and prove that Ms Getgood did have such authority, either expressly or impliedly or on the basis of a course of conduct alleged to give rise to ostensible authority. This has not happened in the Coleford action. In my view

the burden was on the Claimants to plead and prove that Ms Getgood had the required authority to give a confirmation binding upon the GPCT and/or the Defendant, if that confirmation is relied upon as the basis for the Coleford Cap. The Claimants have not discharged this burden.

288. I find that there was never any express agreement, either between the Coleford Partners and the GPCT or between the Coleford Partners and the Defendant, that the service charges payable under the Coleford Tenancy would be subject either to the Coleford Cap or any other such cap. I also find that there is no evidence on the basis of which the parties, meaning the Coleford Partners on the one side and the GPCT and/or the Defendant on the other side, can be taken to have intended that the service charges payable under the Coleford Tenancy would be subject either to the Coleford Cap or any other such cap.

289. I therefore conclude that the obligation to pay a service charge under the terms of the Coleford Tenancy is not subject to the Coleford Cap, or indeed to any other form of contractual cap beyond the reasonableness limitations which appear in the obligation itself to pay the service charge.

290. There is one other matter which I mention by way of postscript to my decision on the Coleford Cap. The Claimants' draft order included a provision providing for the Coleford Claimants to be liable to pay over leasehold reimbursement costs in relation to the relevant services provided and expenses incurred by the Defendant pursuant to the 2004 Directions and the 2013 Directions (to the extent received by the Coleford Claimants). No such provision is required or appropriate in the Coleford Tenancy, because I have already found that the Coleford Tenancy contains a wider obligation on the part of the tenant to pay a service charge. The proposed inclusion of this provision was however, I have no doubt, included to meet the criticism that the Coleford Cap, if it existed, applied to reimbursable and non-reimbursable service charges, which seemed a very odd state of affairs. I mention this point because it seems to me to bring out further the difficulties in the Claimants' case that the obligation to pay the service charge in the Coleford Tenancy is subject to the Coleford Cap.

(iv) <u>Coleford – Are management costs recoverable?</u>

291. I can take this question shortly, because I have already set out the relevant law and my own reasoning in relation to management costs in Valley View. I have found that the Coleford Tenancy contains an obligation on the part of the tenant to pay, on demand, the landlord's reasonable costs of services reasonably provided. Applying *Waverley* it is clear that wording of this kind is wide enough to include the Defendant's own management costs of providing the relevant services. Applying my reasoning in Valley View, it is not, at least in principle, objectionable for the Defendant to calculate these management costs by adding percentages to the external costs of delivering the relevant services.

292. I therefore conclude as follows in relation to the question of whether management costs are recoverable under the terms of the Coleford Tenancy.
    (1) Management costs are, in principle, contractually recoverable under the terms of the Coleford Tenancy, as part of the reasonable costs of the

services which are the subject of the tenant's obligation to pay a service charge in the Coleford Tenancy.

(2) This is not a decision that management costs are in fact recoverable in respect of the services identified in my previous sub-paragraph, in relation to the service charge years which are the subject of the counterclaim in Coleford. There may be other defences to the claim for these management costs which fall to be considered in Trial 2, including in relation to whether the management costs qualify as reasonable costs.

(v) Coleford – Is the counterclaim for alleged arrears of service charge due in respect of the service charge year 2013/2014 statute barred?

293. The claim for alleged arrears of service charges in the Coleford Amended Defence and Counterclaim includes a claim for an alleged balance due for the service charge year 2013/2014, in the sum of £10,609.52; see Amended Schedule 2A to the Coleford Amended Defence and Counterclaim. The Coleford Claim Form was issued on 15th January 2020. This means that, for limitation purposes, the counterclaim for alleged arrears of service charge is deemed to have been made on 15th January 2020; see Section 35(1)(b) of the Limitation Act 1980 **("the Act"**).

294. Paragraph 23 of the Coleford Reply and Defence to Counterclaim pleads that the claim for 2013/2014 is statute barred. No provision of the Act is pleaded, but I assume that Section 5 of the Act is relied upon, which prescribes a six year period of limitation for a claim in simple contract. The Coleford Tenancy is an implied tenancy. It was not created by a document under seal. The Coleford Reply to Defence to Counterclaim denies that the relevant part of the counterclaim is statute barred. It is contended by the Defendant, in paragraph 9, that the relevant service charges were all demanded within six years of the issue of the Coleford Claim Form.

295. The limitation period applicable to a claim in simple contract, without more, is six years from the date of the relevant breach of contract. The obligation of the Coleford Claimants to pay a service charge under the terms of the Coleford Tenancy is an obligation to pay on demand. Accordingly, if one assumes that the sum of £10,609.52 is due from the 2013/2014 service charge year, the Coleford Claimants will have been in breach of contract at the point when they failed to pay this sum in compliance with the obligation to pay the service charge. That point will not have occurred until a demand was made for the relevant sum. Indeed it seems to me that the breach of contract would probably have occurred shortly after receipt of the relevant demand, on the basis (although I do not formally decide this point) that one implies a reasonable amount of time, albeit only a short period of time, for the Coleford Claimants to receive the demand and deal with the logistics of payment. I should also add that what I have just said assumes that the sum of £10,609.52 was either the sum demanded or part of the sum demanded by a single invoice. By reference to the invoices listed in Amended Schedule 1 to the Coleford Amended Defence and Counterclaim it is not clear that the sum of £10,609.52 was a sum due on a single invoice. It is therefore possible that the present case is one where non-payment of the sum of £10,609.52, assuming that the sum was due and unpaid, will have engaged more

than one breach of contract and, consequently, different limitation periods applying to different parts of the sum of £10,609.52.

296. Amended Schedule 2A to the Coleford Amended Defence and Counterclaim records that the combined sum of rent and service charges demanded for 2013/2014 was £63,160.14, of which £52,550.62 was paid, thereby generating the alleged arrears for that year of £10,609.52. Amended Schedule 1 to the Amended Defence and Counterclaim records the dates of invoices said to have been sent out for 2013/2014 and also records the dates on which sums were said to have been received in 2013/2014. The sums shown as received together make up the total receipts of £52,550.62 for 2013/2014. The content of what was the original Schedule 1 was variously denied or not admitted in paragraph 10 of the Coleford Reply and Defence to Counterclaim. The only exception was an admission that the Coleford Claimants accepted the payments in the receipts column as payments made by them, but without admission as to whether they related to rent or service charges. By a Request for Further Information dated 13th March 2021 the Claimants sought further information in respect of Schedule 1 (now Amended Schedule 1) including information about demands for payment. The Claimants submitted that these requests were not properly answered. I accept this submission, in that I was not referred to any document which contained a proper answer to the requests raised.

297. Ultimately, in closing submissions, the Claimants took the stance that it was for the Defendant to satisfy the court that the claim for £10,609.52 was not statute barred, and submitted that the Defendant had failed to do this on the evidence before the court. In response the Defendant contended, in closing submissions, that this was an impermissible reversal of the burden of proof, and that it was for the Claimants to prove that the claim was statute barred. In closing submissions the Defendant also took me through the figures for 2013/2014 in Amended Schedule 1 to the Amended Defence and Counterclaim, in an attempt to demonstrate that the figure shown outstanding for 2013/2014 actually represented sums invoiced as rent on 28th February 2014 and 12th March 2014, which were subsequently paid by a single payment on 30th April 2014. Each of these figures was £5,304.76, and the two figures add up to £10,609.52. The Defendant's point, as I understood it, was that analysis of Amended Schedule 1 demonstrated, or at least suggested that nothing of what was claimed had accrued due prior to the critical date of 15th January 2014. To this the Defendant added the argument that it was entitled to, and had appropriated later payments to earlier arrears with the result that any sums which were outstanding prior to 15th January 2014 had been paid off out of later payments.

298. So far as the burden of proof is concerned, I accept the argument of the Claimants that it was for the Defendant to satisfy the court that the claim for £10,609.52 was not statute barred. The Claimants' position involves no impermissible reversal of the burden of proof. The question of where the burden of proof lies in relation to a defence of limitation is discussed in McGee on Limitation Periods (8th Edition) at 21-013 to 21.017. The point is there made that a defence of limitation is capable of throwing up a variety of issues, with the result that the incidence of the burden of proof may also vary, or indeed shift as matters progress in relation to an issue of limitation. Nevertheless, the general principle is identified in

McGee, at 21.014, that once a defendant raises limitation as a defence it is for the claimant to show that the action is not statute barred. This statement of general principle, as it appeared in an earlier edition of McGee, was approved by Judge Havelock-Allan QC, sitting as a judge of the High Court in *MAC Hotels Limited v Rider Levett Bucknall UK Limited* [2010] EWHC 767 (TCC). The judge was considering limitation in the context of an application for disclosure and inspection of documents in a case where Section 14A of the Act was in issue. The judge said this about the burden of proof:

> *"42. I should start by saying something about the burden of proof under section 14A. The burden of proof in limitation cases rests on the claimant against whom the defence of limitation is pleaded. In my judgment it is for the claimant to establish that he has a claim which he can bring which is not statute barred (see in particular paragraph 21.10 of McGee on Limitation 5th edition, and the judgment of Lawton LJ in Ketterman v Hansel Properties Ltd [1985] 1 All ER 353). By the same token, it is for the claimant to satisfy the court that he lacked the requisite knowledge under section 14A until a point in time less than three years prior to the date on which the claim form was issued and or that the claim is one which meets the conditions of CPR 17.4 and therefore falls within one of the permitted exceptions in section 35 of the Limitation Act (see e.g. CPR 14.4 and the decision of the Court of Appeal in Goode v. Martin)."*

299. While the judge was specifically concerned with the burden of proof in relation to Section 14A, it is quite clear from the second and third sentences of this paragraph that the judge was also addressing the question of the burden of proof more widely. I respectfully agree with the judge that, as a general principle the burden rests on the claimant to prove that their claim is not statute barred, once a defence of limitation has been pleaded. This general principle is capable of giving way to particular circumstances where, in relation to a particular issue, the burden of proof may shift, or may lie with the defendant. Subject to this, the general principle, where a defence of limitation is raised, is that it is for the claimant to show that the relevant claim is not statute barred.

300. In the present case therefore, the burden is on the Defendant, as the effective claimant in relation to the claim for alleged arrears of service charge, to demonstrate that no part of its claim is statute barred.

301. With this in mind I come to the Defendant's argument that analysis of Amended Schedule 1 demonstrated, or at least suggested that nothing of what was claimed had accrued due prior to the critical date of 15th January 2014.

302. Amended Schedule 1 to the Coleford Amended Defence and Counterclaim shows, in the penultimate column, what was invoiced and what was paid/received in 2013/2014. There is no dispute that the figures, in red and in brackets, shown as payments in the penultimate column were received in the amounts and on the dates shown in the penultimate column. The same applies to the equivalent figures for each succeeding year in the penultimate column. The payments made in the 2013/2014 service charge year, when set against the sums demanded for the same year, generate a shortfall of £10,609.52, which is shown, in the final column of Amended Schedule 1, as the shortfall for the 2013/2014 year. That

shortfall is also, as it happens, equal to the sum of the last two sums demanded in the 2013/2014 year. The sums in question, as I have already noted, were a sum of £5,304.76 invoiced on 28th February 2014, and a sum of £5,304.76, invoiced on 12th March 2014.

303. If one then moves into the next service charge year, namely 2014/2015, one finds a payment of £10,609.52 being made on 30th April 2014. If one compares this payment with the first invoices sent out in the 2014/2015 service charge year, one finds that the first invoice was dated 29th April 2014, for the sum of £2,916.67. One then finds a payment of £2,916.67 recorded in the penultimate column of Amended Schedule, which was received on 2nd June 2014. The next payment one finds in the penultimate column for this year is a payment of £11,624.57, received on 1st August 2014. If one then looks at the second, third and fourth invoices for this years, they comprise an invoice for £5,791.23 dated 29th May 2014, an invoice for £2,916.67 also dated 29th May 2014, and an invoice for £2,916.67 dated 26th June 2014. The sum of the figures shown in these three invoices is £11,624.57. £11,624.57 is the sum which is shown as having been paid on 1st August 2014.

304. The obvious inference to be drawn from this analysis is that it is possible to match up, at least in relation to the payments which I have considered, the relevant payment with the relevant invoice or invoices. As a matter of common sense, it is difficult to draw any conclusion other than that the payment of £10,609.52 which was received on 30th April 2014 was paid in discharge of the sums due on the last two invoices for the previous service charge year. If this is correct, and although the invoices and payments do not match up so neatly, it is difficult to draw any conclusion other than that the payments shown as having been received in 2013/2014 were paid in discharge of the sums shown as having been invoiced in 2013/2014 (with the exception of the last two invoices dated 28th February 2014 and 12th March 2014).

305. In their criticisms of the Defendant's spreadsheets, the Claimants made the important point that, by reference to the Defendant's methodology, payments have been allocated in the financial year in which they have been made, rather than the financial year to which they relate. The sum of £10,609.52, which is shown as received on 30th April 2014, seems to me to be a good example of this practice, and the confusion which it can engender. Amended Schedule 1 to the Coleford Amended Defence and Counterclaim shows the sum of £10,609.52 as apparently being due in respect of the 2013/2014 service charge year. This same figure is then imported into Schedule 2A as a figure apparently outstanding for 2013/2014. If however one carries out some analysis of the invoices and payments shown in Amended Schedule 1, it rapidly becomes apparent that there is a different inference to be drawn; namely that the figure of £10,609.52 which appears as outstanding for 2013/2014 was in fact paid, more or less when one would have expected it to be paid, early on in the 2014/2015 service charge year. What can also be inferred, on this basis, is that the sums which are shown as invoiced prior to the last two invoices in 2013/2014 were all in fact paid by the payments which appear in the penultimate column as receipts for 2013/2014.

306. The important point seems to me to be this. Applying my analysis of Amended Schedule 1, it seems to me (and I so find) that the analysis demonstrates, on the balance of probabilities, that there is not in fact any sum which remains due and unpaid in respect of the 2013/2014 service charge year. I find that everything which is shown as having accrued due in the 2013/2014 service charge year was in fact paid off, by the payments shown as having been made in the 2013/2014 service charge year and by the first payment shown as having been made in the 2014/2015 service charge year.

307. The position would be different if some specific appropriation had been made, either by the Coleford Partners or by the Defendant, which allocated payments in such a way as to leave the sum of £10,609.52, or some other sum outstanding from 2013/2014. There is however no evidence in the present case of any specific act of appropriation in relation to the relevant payments. In the absence of any such evidence, it seems to me that I am able to apply my own analysis to the figures, with a view to determining, on the balance of probabilities, what was paid and what (if anything) was left unpaid at the relevant time.

308. In these circumstances I find that, in the case of Coleford, there is no sum outstanding which accrued due prior to 15th January 2014. It follows that if and in so far as the Coleford Claimants may be in breach of contract, in consequence of a failure to pay service charges, no such breach of contract occurred prior to 15th January 2014. As such, I consider that the Defendant has succeeded in discharging the burden of demonstrating that its claim for alleged arrears of service charge in Coleford is not affected by any defence of limitation.

309. The issue which I am considering in this context is whether the counterclaim for alleged arrears of service charge due in respect of the service charge year 2013/2014 is statute barred. It seems to me that this issue is incorrectly stated. On the basis of my analysis of the figures, my conclusion is that there is in fact no counterclaim to be made for alleged arrears of service charge due in respect of 2013/2014, because everything which was demanded in that year has already been paid. Where this leaves the overall arrears position is a matter for Trial 2.

310. It seems to me that the correctly stated conclusion in this context is that there is no defence of limitation in relation to Coleford, because there are no sums which can be said to be outstanding from the 2013/2014 service charge year.

(vi) Coleford - What is the current extent of the premises demised by the Coleford Tenancy?

311. As I have already explained, the Defendant has counterclaimed for declarations as to the extent of the premises currently demised by the relevant Tenancies in Coleford, Bushbury, St Andrews, and St Keverne. The extent of the current occupation has been admitted by the relevant Claimants in each of these cases. It will be recalled that current occupation in this context does not mean occupation at the date of this trial, but occupation at the time when the Defendant made its counterclaims for declarations as to the extent of the premises demised in Coleford, Bushbury, St Andrews, and St Keverne and/or at the time when the Claimants made their admissions of current occupation. As I have also explained, the Claimants made an application, in the course of closing submissions, for

permission to withdraw their admission and dispute the extent of the current occupation in St Andrews. It was not clear to me whether the equivalent application was being made in Coleford.

312. Dealing specifically with Coleford, I start with the relevant pleaded position. Paragraph 20 of the Coleford Amended Defence and Counterclaim pleads as follows:

> *"The parts of the Building occupied by the Claimants in the period since 1 April 2013 have fluctuated over time. The parts of the Building currently occupied by them are shown cross-hatched turquoise on the occupation plan annexed to this Amended Defence and Counterclaim ("the Occupation Plan")."*

313. A plan of the Coleford Building is annexed to the Amended Defence and Counterclaim ("the Coleford Current Occupation Plan"). A large proportion of the floor area is shown, by turquoise hatching, as being in the current occupation of the Coleford Claimants. Paragraph 41 of the Amended Counterclaim counterclaims for various declarations including, at paragraph 41.1, a declaration *"As to the precise extent of the part or parts of the Building that are demised by the Tenancy"*.

314. The pleaded response to paragraph 20 of the Amended Defence and Counterclaim is at paragraph 9 of the Coleford Reply and Defence to Counterclaim, which is in the following terms:

> *"As to paragraph 20 it is admitted that the cross-hatched turquoise area on the Occupation Plan is a true representation of the area that the Claimant currently occupies, save that the waiting area outside the podiatry room is for use by Gloucestershire Care Services and is not used by the Claimant. The parts of the building occupied have not fluctuated since 2012/2013 aside from taking up occupation of an additional space from 2017/2018. The Defendant is required to prove the varying occupancy percentages attributed to the Claimant in Schedule 1."*

315. The reference to the waiting area outside the podiatry room turned out to be irrelevant because, as Ms Docking confirmed in cross examination, the relevant area is not shown hatched turquoise on the Coleford Current Occupation Plan. So far as the reference to varying occupancy percentages is concerned, I understood this to be a reference to the occupancy percentages applied by the Defendant to the service charge years in respect of which the claim to alleged arrears of service charge is made. I believe that the correct reference is to Schedule 2 (as now amended) to the Amended Defence and Counterclaim, where the varying occupancy percentages are to be found. In any event, the varying occupancy percentages are relevant to the issue concerning historic occupation. They do not affect the admission of the Coleford Current Occupation Plan as an admission of current occupation.

316. Paragraph 41.1 is dealt with in paragraph 24 of the Reply and Defence to Counterclaim, which states that *"As to paragraph 41.1, the Claimant avers that it occupies parts of the Property as set out in paragraph 9 above"*.

317. On the pleaded position therefore, there should be no difficulty in the making of a declaration as to the current extent of the premises demised by the Coleford Tenancy, given that it is accepted that the premises demised by the Coleford Tenancy comprise the premises occupied by the Coleford Partners from time to time. The current occupation has been shown by the Defendant on the Coleford Current Occupation Plan, and the Coleford Claimants have admitted that the Coleford Current Occupation Plan is correct in showing the current occupation. The only matter which should remain to be resolved is the identification of the appropriate date to which the declaration should be tied, in order to reflect what is meant by current occupation in this context.

318. As I have noted however, when explaining the common issues in the five actions, the Claimants produced a Closing Note on Occupancy which attached plans for Coleford, Bushbury, and St Andrews which were put forward as the current occupation plans to be used if declarations were to be made as to the current extent of the premises demised by the relevant tenancies. As I have also noted, the Claimants' plans do not match up with the relevant current occupation plans attached to the relevant Amended Defences and Counterclaims. In Bushbury the discrepancy is not controversial. I will come back to St Andrews later in this judgment. So far as Coleford is concerned, the Claimants' plan is materially different to the Coleford Current Occupation Plan; having more areas shown hatched turquoise and thus showing a greater area of current occupation.

319. The difficulty with entertaining the Claimants' case on current occupation is the Claimants' admission of current occupation, as shown on the Coleford Current Occupation Plan, in paragraph 9 of the Reply and Defence to Counterclaim. It seems to me that the only way out of this difficulty for the Claimants was to apply for permission to withdraw the admissions. As I have said, it was not clear to me whether the application to withdraw the equivalent admission in St Andrews, which was made in closing submissions, was intended to extend to Coleford. I should also make it clear, in passing, that no formal application notice was issued to withdraw the admission in St Andrews. The application was made orally, in the course of the Claimants' closing submissions on occupancy.

320. Given this situation, and given that I do have to deal with an application to withdraw the admission in St Andrews, it seems to me that the correct way forward is to take the slightly unusual course of considering how I would have dealt with an application to withdraw the admission in Coleford, if such an application had been made. So far as I can see, the grounds for the application in Coleford would not be materially different to those I have considered in relation to St Andrews. If therefore I have misunderstood the position, and the Claimants did intend to make an application to withdraw the admission in Coleford, what follows is my decision on that application. If the Claimants did not, for any reason, intend to make such an application in Coleford, then what follows is what my decision would have been, if such an application had been made.

321. As the Claimants' admission was made after the Coleford action had been commenced, the Claimants would have required the permission of the court to withdraw the admission; see CPR 14.1(5). Paragraph 7.2 of CPR PD14 explains how the court is required to approach such an application. The court is required

to have regard to all the circumstances of the case, including a list of factors set out in sub-paragraphs (a) to (g) of paragraph 7.2. These specific factors are as follows:

> *"(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made*
> *(b) the conduct of the parties, including any conduct which led the party making the admission to do so;*
> *(c) the prejudice that may be caused to any person if the admission is withdrawn;*
> *(d) the prejudice that may be caused to any person if the application is refused;*
> *(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;*
> *(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and*
> *(g) the interests of the administration of justice."*

322. The Claimants' application to withdraw the admission in St Andrews was not supported by any evidence. Nor were submissions made, in support of the application for withdrawal of the admission, which either addressed the factors in paragraph 7.2, or referred me to evidence in the trial which was relevant to the consideration of these factors. This was not perhaps surprising. The application to withdraw the admission was made in the course of closing submissions, and had the appearance of something of an afterthought.

323. Looking through the factors in paragraph 7.2, as they would have applied in the case of an application to withdraw the admission in Coleford, all seem to me to point clearly to refusal of the application. Using the same lettering as in paragraph 7.2, I deal briefly with each factor:

(a) The grounds upon which the application was made (if it was made) were opaque. The catalyst for the application appeared to be the taking of instructions referred to in paragraph 5 of the Closing Note on Occupancy, which was said to have occurred *"since the close of the hearing"*, which I take to mean since the close of the evidence. In any event, there was no suggestion of new evidence having been found which was not previously available.

(b) There was no suggestion of any conduct, either on the part of the Defendant or otherwise, which justified the application.

(c) The question of prejudice to the Defendant was not addressed, but it does seem to me that it would unfair to the Defendant to find that an admission upon which it had assumed it was entitled to rely, all the way through to closing submissions in Trial 1, could then be withdrawn by the Claimants.

(d) The question of prejudice to the Claimants was not addressed. As such, I cannot find that prejudice would be caused to the Claimants if they are held to their admission.

(e) The application was made almost as late in the day as it could have been, without explanation or justification for the delay in making the application.

(f) If I had granted permission for the admission to be withdrawn, it is not clear what I was then supposed to do. The question of historic occupation was

explored in the evidence and was the subject of extensive submissions. The same was not true of current occupation, presumably because it was assumed on both sides that the position was governed by the admission. I cannot see how I would have been able to resolve the differences between the Coleford Current Occupation Plan and the Claimants' rival plan, particularly when the Claimants' rival plan was the product of instructions to which I and, I assume, the Defendant were not privy.

(g) It is clear to me that the interests of administration of justice point firmly in favour of the application being refused. It seems to me that a late and informal application of this kind would require very particular circumstances, and very good grounds before it could be permitted. There are no such circumstances or grounds in the present case.

324. Having regard to all the circumstances of this case, and having particular regard to the factors listed in paragraph 7.2, it seems to me that the application for permission to withdraw the admission in Coleford, if it had been made, would have fallen to be refused. If I have misunderstood the position, and the application was in fact made, it falls to be refused.

325. It seems to me that there should be a declaration as to the current extent of the premises demised by the Coleford Tenancy. On the basis of the discussion set out above, it seems to me that the declaration should be based on the admitted position in the Coleford action. I will therefore make a declaration that the current extent of the premises demised by the Coleford Tenancy is as shown on the Coleford Current Occupation Plan. This leaves outstanding the identification of the appropriate date to which the declaration should be tied, given what I have said about the meaning of current occupation in this context. I will hear the parties on this question, if an appropriate date cannot be agreed.

(vii) <u>Coleford – What proportion of the Coleford Building have the Coleford Partners occupied in each of the service charge years to which the counterclaim relates?</u>

326. The progress of the dispute over historic occupation in the course of Trial 1 is best described as an unhappy one.

327. Amended Schedule 2 to the Coleford Amended Defence and Counterclaim shows a list of the services alleged to have been provided to the Coleford Building, together with their alleged cost. Also shown is a percentage figure for each year which has been used to derive, from the total cost for each service year, the share of that cost for which the Coleford Claimants are alleged to be liable. The percentage figure is based on the proportion of the Coleford Building which the Coleford Partners are alleged to have occupied in the relevant years. The percentage figures are not agreed. The agreed list of issues for Trial 1 lists the following issue as an issue to be determined in Trial 1:

> *"What proportion of the subject building have the Claimants occupied in each of the service charge years to which the counterclaim relates?"*

328. This issue is listed, in these terms, for Coleford, Bushbury, and St Andrews. The reason why this issue matters was explained by Michael Lewis, one of the Defendant's contextual witnesses, who is employed by the Defendant as Principal Property Finance Manager for the South West Region. In his witness statement

Mr Lewis explained that where a GP practice does not occupy a whole building, the practice is charged a proportion of the costs attributable to the building according to the ratio that the net rentable area occupied by the practice bears to the net rentable area of the whole of the building. This proportion can of course change from service charge year to service charge year. So far as I am aware, there was no dispute between the parties that service charges, to the extent that they are payable under any of the Tenancies, should be apportioned in this way.

329. The Coleford Amended Defence and Counterclaim does not, in terms, counterclaim for a declaration as to historic occupation, but identification of the correct occupancy percentage for each service charge year in respect of which alleged arrears of service charge are claimed is obviously essential to the determination of the amount of arrears (if any) which may be due from the Claimants. As I have also noted above, the issue of historic occupation was clearly listed as an issue for Trial 1.

330. Concentrating on Coleford, the Defendant sought a determination of the percentage occupancy in respect of the Coleford Building for the following service charge years, in the following figures:
2015/2016 – 54.4%
2016/2017 – 59.55%
2017/2018 – 59.55%
2018/2019 – 66.42%
2019/2020 – 67.03%

331. These were the same occupancy percentages as those contended for in Amended Schedule 1 to the Coleford Amended Defence and Counterclaim, with one exception. The exception was 2015/2016, where the figure in Amended Schedule 1 was 46.46%. Technically, I suppose this change of figure required a re-amendment of the Coleford Amended Defence and Counterclaim, but I did not understand this point to be taken by the Claimants, and I am not minded to take the point myself. So, the occupancy percentages contended for by the Defendant are as set out in my previous paragraph.

332. One might have hoped that the parties would have been able to agree the relevant occupancy percentages, at least for some of the relevant years. One might also have expected that the parties would, at the least, have been able to agree on the service charge years for which a determination was required. To this end the parties produced a document which was described as a Joint Plans and Occupancy Tables. Unfortunately this document did not contain any agreement on either of these matters.

333. So far as actual occupancy percentages were concerned, the Claimants did not put forward any rival figures for any service charge years, either for Coleford, or Bushbury, or St Andrews. Instead the Claimants made a non-admission of the figures contended for by the Defendant and, in a separate column of the relevant table for each set of Premises, listed documents which, so the Claimants contended, contradicted the occupancy percentages contended for by the Defendant. The Claimants' case was that there was insufficient evidence before the court to determine any historic occupancy percentages. In those

circumstances, so the Claimants submitted, the claims of the Defendant for declarations as to historic occupancy percentages should be dismissed, rather than deferred to Trial 2.

334. Turning to the relevant service charge years the position was, frankly, somewhat baffling, at least to me. The tables in the document to which I am referring (the Joint Plans and Occupancy Tables) showed the Defendant's figures for occupancy percentages in relation to a limited number of service charge years. In the case of Coleford those service charge years were as I have listed them above. In the case of Bushbury a determination of occupancy percentages was sought by the Defendant for only three years (2017/2018, 2018/2019, and 2019/2020). In the case of St Andrews a determination was sought by the Defendant for only four years (2016/2017, 2017/2018, 2018/2019, and 2019/2020). The tables also showed however earlier service charge years, which I understood to have been included by the Claimants, on the basis that there were documents which evidenced occupancy percentages for those years which undermined the occupancy percentages for the service charge years for which the Defendant sought a determination. In the case of the table for Coleford this resulted in the inclusion of 2007 as an allegedly relevant service charge year.

335. At first sight, it was surprising that the Defendant was seeking a determination of occupancy percentages for fewer service charges years than those which were pleaded in the relevant Amended Defences and Counterclaims as being the subject of the counterclaims for alleged arrears of service charges. In the case of Coleford, by way of example, Schedule 2A to the Amended Defence and Counterclaim lists 2013/2014 and 2014/2015 as service charge years which are the subject of the counterclaim for alleged arrears of service charges. The explanation for this, continuing to concentrate on Coleford, was that the Defendant's case was that the sums demanded by way of service charges for these two years had in fact been paid. As it happens, and in relation to Coleford, this position has been vindicated for 2013/2014 because, in my decision on limitation in relation to Coleford, I have decided that everything demanded in respect of 2013/2014 has in fact been paid off. The explanation for the missing service charges years, in the case of Bushbury and St Andrews, is the same.

336. This was not however an agreed position on the service charge years for which a determination of occupancy percentages was required, because the Defendant's case on what, historically, had been paid off was substantially not admitted. There remained the need therefore for the parties to agree on the service charge years for which a determination of the occupancy percentage was required accommodating, as necessary, their rival cases on which service charge years were relevant. It was agreed at trial that the parties would provide me with an up to date identification, agreed if possible (but if not agreed identifying the rival positions of the parties) of the service charge years in respect of which (i) alleged arrears of service charge were claimed, and (ii) a declaration as to the extent of historic occupation was sought by the Defendant. In the event I did not get this. In post-trial communications, the Defendant maintained its position as set out Joint Plans and Occupancy Tables; namely that the tables for the relevant Premises showed the service charge years for which the Defendant was claiming alleged arrears of service charge and for which the Defendant sought a declaration

as to the correct occupancy percentages. In the same post-trial communications, the Claimants maintained their position that there was insufficient evidence to determine any historic occupancy percentages. If I was against the Claimants on that point, the Claimants submitted that occupancy percentages would need to be determined for each year from 2013/2014 onwards. The explanation for this was that the Claimants might have overpaid for earlier years, either because the occupancy percentages used for those earlier years were wrong or for other reasons. The Claimants' case was that they were entitled to reclaim any such overpayments and, for that exercise, accurate occupancy percentages would be required. I confess that this explanation took me by surprise. I had not understood the Claimants to be making a claim, in any of the five action, for the recovery of alleged overpayments of service charges made by mistake.

337. I have had to spend a regrettably lengthy amount of time explaining the history of the argument over historic occupancy percentages because it constitutes the relevant background to my approach to, and determination of the issue of historic occupancy percentages. My approach is as follows:
    (1) It is unfortunate that the Claimants have not provided any occupancy percentages of their own, which they contend are the correct percentages. The Claimants were perfectly within their rights to confine themselves to requiring the Defendant to prove its occupancy percentages, and pointing me to evidence which, as they contended, undermined the case for those occupancy percentages. It would however have been helpful to me to have known what occupancy percentages were said by the Claimants to be correct, not least because one might have expected the Claimants, as the occupiers of the relevant Premises, to be able to provide useful input on this issue.
    (2) The question of historic occupancy percentages is clearly identified as an issue for Trial 1. In those circumstances it seems to me that I should determine that question, so far as it arises, by reference to the evidence which I have heard and received in Trial 1. In making that determination, I must do the best I can on the available evidence, such as it is.
    (3) In terms of the service charge years for which I should make this determination, I will confine myself to the service charge years in respect of which there are alleged to be arrears of service charges. I will exclude years where I am satisfied that whatever was demanded in that year has been paid. I am not prepared to include such excluded years on the basis contended for by the Claimants, which appears to me to involve claims which are not made in the five actions. By reference to this process of exclusion, and in the case of Coleford, it follows from my discussion of limitation that I will make no determination of the correct occupancy percentage for 2013/2014. I will consider the status of 2014/2015, in the case of Coleford, in the discussion which follows.
    (4) I accept the Claimants' point that it is legitimate to consider the question of historic occupancy for service charge years prior to those with which I will be dealing, if and in so far as such historic occupancy may throw light on the level of occupancy in the service charge years with which I will be dealing.
    (5) It seems to me that the burden is on the Defendant, as the party contending for specific figures for the occupancy percentages for the relevant service

charge years, to satisfy me, on the balance of probabilities, that the figures for which it contends are correct.

(6) If it turns out subsequently, and contrary to my approach, that a determination of the historic occupancy percentage is required for any service charge year with which I have not dealt, the relevant determination will fall to be dealt with in Trial 2.

338. Having explained my approach, I am now able to turn to the question of the determination of the occupancy percentages for Coleford for the relevant service charge years. The first question is whether 2014/2015 can be excluded from this determination, on the same basis as 2013/2014 is excluded. I think that 2014/2015 can be so excluded. Carrying out an analysis of the table in Amended Schedule 1, similar to the exercise which I carried out, for limitation purposes, in respect of 2013/2014, it seems to me that there is sufficient evidence of the same process which I have already noted in relation to 2013/2014; that is to say a correspondence between sums falling due and later payments.

339. As I have already noted, the position is confused because Amended Schedule 1 to the Coleford Amended Defence and Counterclaim appears to show a balance as due and owing for 2013/2014, and a small credit for 2014/2015. Schedule 2A also shows a balance apparently due and owing for 2013/2014, and a small credit for 2014/2015. This is however the result of grouping together, in the same service charge year, all sums demanded and all payments received. If one carries out some analysis of Amended Schedule 1 it becomes possible to draw the equivalent conclusion to that which I have already drawn, in the context of limitation, in relation to 2013/2014; namely that all the sums shown as accruing due in the service charge year 2014/2015 have been paid off. I therefore accept and find, on the balance of probabilities, that all the sums which were demanded in the 2014/2015 service charge year were paid off.

340. Turning to the occupancy percentages, the figure for 2015/2016 was amended from 46.46% to 54.4%. This amended figure was supported by various Coleford documents. On 2nd April 2016 Ms Docking sent an email to the credit control department of the Defendant, pointing out that the occupancy percentage shown for Coleford for 2015/2016 on the year end charging schedule was wrong. The year end charging schedule had been emailed to Ms Docking the previous day. In her email of 2nd April 2016 Ms Docking said that the correct figure was 54.4%, not 46.46%. In an email sent on 6th April 2016 Ms Docking said that the correct percentage was 53.54%. In the minutes of a meeting of the Coleford Partners on 28th April 2016 the point is recorded that the occupancy percentage shown by the Defendant was inaccurate, *"and should be 54.4%, not 46.6%"*. I also note, from the same set of minutes that the Coleford Partners expected to be able to substantiate the corrected figure. The following statement appears in the minutes:

> *"Jayne Souter should be able to evidence the percentage breakdown held on file."*

341. In cross examination Ms Docking confirmed that the correct figure for the occupancy percentage was 54.4%. The Claimants drew my attention to various documents which they said contradicted the figure of 54.4%, but I do not think

that any of these documents provide reliable evidence that the figure confirmed by Ms Docking to be correct was in fact wrong.

342. I make specific mention of one of the documents referred to by the Claimants. The document in question was an internal document of the Defendant, described as an FMDI (Facilities Management Data Initiative) Report. The report is described on its face as a revised draft, dated 5th August 2019, and its subject matter is Coleford. There is something of a back story to this report. This report and an equivalent FMDI report for St Keverne were the subject of inadvertent disclosure in the actions by the Defendant. I say inadvertent disclosure because the reports were produced for the purposes of the Defendant reviewing its position with its solicitors and, for that reason, the reports were said to be subject to litigation privilege. This prompted the Claimants to make two applications under the Disclosure Pilot (PD51U), which governs disclosure in these actions. The first application was for permission to rely upon the inadvertently disclosed reports in Coleford and St Keverne. The second was for disclosure of further FMDI reports and associated documents. These applications came before me at the pre-trial review. Cutting a rather longer case management story short, the outcome of the applications was that the Defendant did not resist the applications to rely upon the two inadvertently disclosed reports, but was successful in resisting the application for further disclosure. The upshot of all this was that the Claimants were able to make use of the internal revised drafts of the Defendant's reports on Coleford and St Keverne, each dated 5th August 2019.

343. The FMDI Report for Coleford has a page which is entitled History of Charging, which shows historic occupancy percentages. The occupancy percentage shown for Coleford is 46.6% for 2015/2016. I do not attach importance to this figure, as it appears in this report. The FMDI Report is not a document generated in the process of the day to day management of the Coleford Building and the Coleford Premises by the Defendant. It is a subsequent report compiled, I assume, from information gathered from the documents by those responsible for the preparation of the report. It is known that the original figure for the occupancy percentage for 2015/2016 was 46.46%, which was then corrected at the instigation of Ms Docking to 54.4%. I am satisfied, and find that the incorporation of the figure of 46.46% into the report was an error on the part of those who compiled the report.

344. The Claimants also launched a broader attack on the Defendant's case on occupancy percentages, which it is convenient to deal with at this point. The Claimants contended that determination of the historic occupancy percentages required expert evidence, in the form of a surveyor's report which set out the correct percentages. In the absence of such evidence, so the Claimants contended, it was not for the parties' lawyers or the court to attempt to extrapolate percentages from plans which did not contain measurements, or indeed from plans which did contain measurements. The Claimants contended that the Defendant did not actually know what the correct occupancy percentages were.

345. It would no doubt have been helpful to me if I had had the benefit of a report or reports from surveyors, opining on the correct figures for the occupancy percentages. Neither party has however adduced such evidence. In these circumstances I do not accept that I must just throw up my hands and decline to

engage with this question. There is evidence available pertaining to the issue of historic occupancy percentages. It seems to me that I should engage with that evidence, and make my decision as to whether the Defendant has, on the balance of probabilities, discharged the burden of proving the occupancy percentages for which it contends. It will be appreciated that what I have just said applies not only to my consideration of the occupancy percentage for 2015/2016, in relation to Coleford, but also to my consideration of the occupancy percentage for the succeeding service charge years.

346. Drawing together all of the above discussion, on the evidence I conclude and find that the correct figure for the occupancy percentage for 2015/2016 is 54.4%.

347. The picture for 2016/2017 and 2017/2018 is a sparse one. The Defendant's figure for each of these years is 59.55%. This figure appears in the Annual Charging Schedules for those years. There is however an exchange of emails between Colin Stribling, Senior Property Manager of the Defendant and Ms Docking, in November 2017, concerning a proposal for the Coleford Partners to take on additional space in the Coleford Building. Ms Docking inquired as to what this would mean, in terms of the percentage decrease and increase in rental costs, respectively for the occupier relinquishing the space, and for the Coleford Partners. The answer from Mr Stribling was that the percentage increase in terms of occupation, subject to amendment of the plans to confirm this, would be from 59.55% to 62.23%. In her response to this answer, Ms Docking made no challenge to the figure of 59.55%. In cross examination Ms Docking was asked about the absence of this challenge. Ms Docking's answer to this, in summary, was that she was not in a dispute concerning the extent of occupation, that she knew that up to date plans needed to be prepared, and that the position would be sorted out once up to date plans had been prepared. I did not find this answer to be a satisfactory one. It is clear that Ms Docking was well able to challenge the figure for percentage occupancy when she thought it was wrong, as happened for 2015/2016. I find it significant that, in her exchanges with Mr Stribling concerning the proposed increase in occupation, Ms Docking did not challenge the figure of 59.55%. I also bear in mind that the Coleford Partners appear to have had their own records of occupation; see the extract from the minutes of the meeting of 28th April 2016, which I have quoted above.

348. The picture is, as I have said, a sparse one, but I am prepared to accept and find, on the basis of the available evidence, that the correct figure for the occupancy percentages for both 2016/2017 and 2017/2018 is 59.55%.

349. This leaves 2018/2019 and 2019/2020. It is not in dispute that in May 2018 the Coleford Partners took on additional rooms in the Coleford Building. The before and after plans of the areas occupied by the Coleford Partners were sent to Ms Docking by Mr Stribling attached to an email of 14th June 2019. It follows the correct figure for the percentage occupancy must have risen from 59.55%. Ms Docking responded very quickly, in an email sent on the same day. In her email Ms Docking said as follows:

> *"Thanks Colin. I can see that the increase now hasn't been made previously for the additional space occupied. I've copied Cherri Webb in from the CCG so they are aware of the additional rent costs going forward.*

Can you confirm when the increase in rent will be applied and exact costs please."

350. There was no challenge in this email to the accuracy of the plans which Mr. Stribling had sent. In cross examination, when this point was put to her, Ms Docking insisted that the plan showing the increased occupation was wrong, and that she had pointed this out to Mr Stribling in a separate email. Ms Docking was not however taken to any such email in re-examination, and no such email was identified. My finding is that Ms Docking did not challenge the plans which she was sent by Mr Stribling, attached to his email of 14th June 2019.

351. Given that there is no evidence of a change in the extent of occupation as between 2018/2019 and 2019/2020, it initially seems odd that the figures contended for by the Defendant (66.42% and 67.03%) are different. In theory they should be the same. This discrepancy was explored with Ms Docking in cross examination, by reference to a continuation of the email exchanges between Ms Docking and Mr Stribling on 14th June 2019. The problem which required to be addressed in that email chain, which appears not previously to have been dealt with, was the date from which to backdate the increases in charges, and the decrease in charges for the other occupier which had relinquished to the Coleford Partners the relevant area in the Coleford Building. The relevant date agreed between the parties, including the other occupier, was 1st May 2018. This agreement was acted on by Ms Docking, who subsequently emailed Cherri Webb, who worked for the other occupier involved (NHS Gloucestershire CCG), on 5th July 2019 asking her to organise the backdated rent charges *"for the increase in rent which was due to taking over additional rooms for the GP trainees, from May 2018"*.

352. In cross examination the point was put to Ms Docking that the slightly lower percentage for 2018/2019 was explained by the fact that the Coleford Partners had been given an allowance of one month at 59.55% for this year, to reflect the agreement that the increase in occupation should be taken as commencing on 1st May 2018. Ms Docking said that she thought that was correct. I have not been able to check the arithmetic, but it is an obvious explanation for the discrepancy in the percentage occupation figures for the two years in question.

353. The overriding point is however that all parties appear to have been content to proceed on the basis of the plans produced by Mr Stribling, on which the percentage occupancy figures for the two years in question were based. The Claimants contended that there were documents which undermined the Defendant's figures but, again, I do not think that any of these documents provided reliable evidence that the Defendant's figures were in fact wrong. I again mention specifically the FMDI Report for Coleford, which shows an occupancy percentage of 59.55% for 2018/2019. In this case however there is a note on the relevant page of the FMDI Report which records that while the Annual Charging Schedule for 2018/2019 was based on an occupancy percentage of 59.55% *"an increased occupancy of 67.03% has been agreed to be backdated to 01 May 2018. True Up for FY1819 will therefore be issued on this basis."*. This appears to be consistent with my own findings as to how the figure of 66.42% came about for 2018/2019, and to support that figure.

354. On the evidence I conclude and find that the correct figures for the occupancy percentages for 2018/2019 and 2019/20205/2016 are, respectively, is 66.42% and 67.03%.

355. In conclusion, I find that the proportion of the Coleford Building which the Coleford Partners have occupied in each of the service charge years for which I am making a determination (expressed in percentage terms) is as follows:
2015/2016 – 54.4%
2016/2017 – 59.55%
2017/2018 – 59.55%
2018/2019 – 66.42%
2019/2020 – 67.03%

356. For the sake of completeness, I should make it clear that if I had accepted the Claimants' submission that the evidence was insufficient to permit me to make any determinations as to the correct figures for the historic occupancy percentages, I would not have thought it right to accede to the Claimant's submission that I should, in consequence, dismiss the Defendant's claims for declaratory relief in this respect. On that hypothesis I would have adjourned the issue of the historic occupancy percentages to Trial 2. A decision on this issue is essential to the ultimate determination of what, if anything, is due from the Coleford Claimants by way of arrears of service charges. If the claim for declaratory relief in this respect was to be dismissed in Trial 1, I assume that the Claimants would argue, in Trial 2, that no determination of the historic occupancy percentages was possible because the claim for declaratory relief in this respect had been considered and dismissed in Trial 1. Without expressing a view on the merits of this argument, it strikes me as both wrong and highly unsatisfactory that the court, in Trial 2, should be left either (i) with no decision (from Trial 1) on the required historic occupancy percentages, or (ii) facing an argument that, following the dismissal of the claims for declaratory relief in this respect in Trial 1, it had no ability of its own to determine the required historic occupancy percentages. It is for essentially the same reason that I have also deferred to Trial 2 the determination of any historic occupancy percentages which I have not determined, but which may subsequently turn out to be required.

<u>Bushbury – relevant history</u>

357. I can take the relevant history very shortly. As I have already noted, there is a written tenancy agreement in the case of Bushbury, which is agreed to have taken effect as a quarterly periodic tenancy (the Bushbury Tenancy) on the terms of the written tenancy agreement. Pursuant to the terms of the Bushbury Tenancy the Bushbury Partners have occupied the Bushbury Premises since 1994.

358. Margaret Moses (now Margaret Irason) was the practice manager of the Bushbury practice between 1994 and 2014, save for an initial period of around 12 months when she was assistant practice manager. In 2014 Ms Irason was succeeded by Elizabeth McAndrew as practice manager of the Bushbury practice. Thereafter Ms Irason was the finance officer of the practice until 2019. Ms Irason gave evidence that during the period when WPCT owned and managed the Bushbury Building, the Bushbury Partners would be invoiced quarterly by the WPCT, and would be reimbursed the full amount of the payment by NHSE. WPCT provided

all the services for the Bushbury Building. Ms Irason also said that the Bushbury Partners arranged insurance for the Bushbury Premises. In cross examination Ms McAndrew, who also give evidence, clarified that this was a reference to contents insurance, and that the Bushbury Partners had never insured the Bushbury Building, which they did not own.

359. Following the transfer of the Bushbury Building to the Defendant matters changed substantially, in terms of the charges for the Bushbury Premises. Elizabeth Turner is a Principal Property Finance Manager in the employment of the Defendant. Ms Turner started with the Defendant on 1st April 2013, the date of the statutory vesting, as Regional Finance Manager covering Shropshire and Staffordshire. In May 2016 she became Zone Senior Finance Manager for the West Midlands, and assumed her current role in April 2018. Bushbury has been within Ms Turner's remit since she assumed the role of Zone Senior Finance Manager. In her witness statement Ms Turner explained, by reference to the historic billing records for Bushbury, that during the WPCT years the Bushbury Partners were only being billed for reimbursable costs; being rent, rates, and clinical waste. The non-reimbursable costs of services were effectively subsidised by the WPCT and its predecessors. This was not an entirely correct analysis, because the relevant invoices from the WPCT years show the Bushbury Partners being billed for rent, reimbursable items, and other services. The relevant point however, as Ms Irason explained, was that the Bushbury Partners were reimbursed for the cost of these services, notwithstanding that they fell outside the items which were normally reimbursable under the 2004 Directions.

360. Following an initial period, during which the Defendant operated the same billing practice as the WPCT, the Defendant moved to a full cost recovery approach. This meant that, in theory, the Bushbury Partners no longer enjoyed the benefit of being reimbursed in respect of service charges which were not, on the face of it, reimbursable under the 2013 Directions. For reasons however which remain obscure there was a substantial increase in the sum received by the Bushbury Partners from NHSE as from 2014/2015. The increased amount was £59,575 which, by reference to an email sent by NHSE on 5th July 2016, was regarded by NHSE as including everything payable in respect of the Bushbury Premises (including service charges), save for gas and electricity which were identified as non-reimbursable costs. In 2014/2015 this left the Bushbury Partners with a surplus between what they paid the Defendant and what they received from NHSE, but in the following years the Bushbury Partners paid all of this annual sum of £59,575 to the Defendant. The essential point is that, with the exception of 2014/2015, the Bushbury Partners have paid to the Defendant what they have received from NHSE, consistent with their previous practice with the WPCT.

361. Equally, and without getting into the detail of the matter, it is not in dispute that, over the years, a variety of services have been provided, originally by the WPCT and then by the Defendant in respect of (I use a deliberately neutral phrase) the Bushbury Building and its surrounding premises.

<u>Bushbury – discussion and determination of the issues</u>

(i) <u>Bushbury - On the true construction of the terms of the Bushbury Tenancy, for which services do the Bushbury Claimants have to pay service charges?</u>

362. Clause 5.2 of the Bushbury Tenancy provides as follows:

> *"5.2 Outgoings*
> *5.2.1 To pay and indemnify the Landlord against all taxes assessments duties*
> *5.2.2 To pay to the Landlord the apportioned cost of services supplied to the Premises including gas electricity and water such costs to be reasonably determined by the Landlord and payable by the Tenant quarterly on demand*
> *5.2.3 To pay to the Landlord the cost of any external telephone calls made from the Premises quarterly on demand*
> *5.2.4 To pay to the Landlord the apportioned cost of repairing maintaining and decorating the interior of the Premises on demand"*

363. The parties were agreed that clause 5.2 (specifically clause 5.2.2) requires the tenant to pay for a wide variety of services. In the colour coded schedule attached to their skeleton argument for Bushbury, the Bushbury Claimants accepted an obligation to pay for a wide variety of different services.

364. This common ground is important, because it acknowledges, correctly in my view, that the reference to gas electricity and water in clause 5.2.2 is non-exhaustive. The *"services supplied to the Premises"* include, but are not limited to gas, electricity and water.

365. Turning then to the items in dispute, and putting management costs to one side for the moment, the items in dispute are (i) grounds and garden maintenance/planned contract maintenance, (ii) grounds and garden maintenance (reactive), (iii) insurance, (iv) professional fees, and (v) snow clearing and gritting (planned). I can put professional fees to one side at the outset. As I have already explained, in my discussion of the common issues in the five actions, all decisions on the recoverability of professional fees, whether decisions on in principle recoverability or otherwise, are for Trial 2.

366. The essential argument of the Claimants, in this context, was that the references to services in clause 5.2.2 was limited to services supplied to *"the Premises"*. The Premises are defined in the Bushbury Tenancy to mean the following:

> *"Part of Bushbury Clinic Wolverhampton sketched red on the plan annexed hereto together with the right to use in common with the Landlord those parts of the Clinic sketched green on the said plan"*

367. There are in fact two plans incorporated into the Bushbury Tenancy; one for the ground floor and one for the first floor. The plans are of poor quality but the relevant point, for present purposes, is that the Premises, as defined in the Bushbury Tenancy, are not the entirety of the Bushbury Building, but only those internal parts of the Bushbury Building shown on the plans. As I read the definition, the Premises are only the areas identified in red on the plans, with arears identified in green not comprising part of the Premises, but rather being identified as premises over which the Bushbury Partners were to have rights of common use. In any event, the relevant point remains that the Premises are defined as internal parts of the Bushbury Building only. As I have already noted,

the Bushbury Premises have never comprised the whole of the Bushbury Building.

368. Based on this definition of the Premises, the Claimants' argument was that none of grounds and garden maintenance, or snow clearing or gritting, or insurance could qualify as services provided to the Premises, because they were not provided *"to"* the Premises themselves. Grounds and garden maintenance, and snow clearing or gritting were services provided to areas external to the Premises and, as such, could not qualify as services supplied to the Premises. The same was said to be true of the insurance of the Bushbury Building, which could not qualify as a service supplied to the Premises.

369. In my view this is too narrow a construction of clause 5.2.2, and cannot have been what was intended by the original parties to the Bushbury Tenancy. Two points seem to me to be important.

370. First, it is important to keep in mind the nature of the services which are in dispute. If one takes a service such as snow clearing and gritting, the service is required so that persons who wish to obtain access to the Bushbury Building can do so in safety, at times when snowfall renders access to the Bushbury Building difficult or unsafe. A significant number of those persons, it seems reasonable to conclude, will be persons obtaining access specifically to the Bushbury Premises, either because they work in the Bushbury Premises or because they are visiting the Bushbury Premises. With this position in mind, it seems to me somewhat odd to describe snow clearing and gritting as a service which is not supplied to the Premises, as defined in the Bushbury Tenancy. The reality seems to me to be that the service is supplied to the Premises.

371. The same point can be made about buildings insurance. If the Bushbury Building burns to the ground, the Bushbury Premises will burn down with them. All being in order in terms of insurance cover, the cost of reconstructing the Bushbury Premises will be met by a claim on the buildings insurance, as part of the cost of reconstructing the Bushbury Building. Again, with this position in mind, it seems odd to describe insurance as a service which is not supplied to the Premises.

372. Turning to grounds and garden maintenance, there might be said to be more in the argument that this is not a service supplied to the Premises. It might be said that there is no link, of a kind which can be said to exist in relation to snow clearing and gritting, between maintenance of the areas external to the Coleford Building and the Premises. In my view however the essential link is the same. It is plainly in the interests of the Bushbury Premises and all who work in or visit the Bushbury Premises, that the external areas should not be allowed to become an unkempt wilderness. The advantages to the Bushbury Premises might be said to be cosmetic only, but it is not difficult to think of problems for the Bushbury Premises which would be caused by unkempt surroundings; ranging from encouragement of unwanted activities, through encouragement of rats and other pests, to actual obstruction of access to the Bushbury Building. With this in mind, it again seems odd to describe grounds and garden maintenance as a service which is not supplied to the Premises.

373. Second, the obligation contained in clause 5.2.2 is to pay the landlord *"the apportioned cost of services supplied to the Premises"*. This seems to me to recognise that the cost which the tenant will have to pay will be part of the cost of services provided to the Bushbury Building as a whole. The tenant is required to pay an apportioned part, with such apportionment being made (as is common ground between the parties) by reference to the proportion of the Bushbury Building occupied by the Bushbury Partners. This seems to me to militate against a narrow reading of clause 5.2.2. If the cost payable under clause 5.2.2 can only be the cost of services provided directly to the Premises, it seems odd that this cost is in fact identified as an apportioned part of the cost of services which must, if apportionment is required, be provided to a wider area than the Premises. If, on the other hand, the services referred to in clause 5.2.2 encompass all services provided to the Premises, as part of services provided to the entirety of the premises, internal and external, of which the Premises form part, the reference to apportionment makes much better sense.

374. I therefore conclude that, on the true construction of the terms of the Bushbury Tenancy, the services for which the Bushbury Claimants have to pay service charges include grounds and garden maintenance (planned and reactive), snow clearing and gritting (planned and reactive), and buildings insurance.

375. The Defendant's draft order includes a list of services which are said to fall within the terms of clause 5.2 of the Bushbury Tenancy. The list is not expressed to be exhaustive. The list includes the items which I have decided do fall within the terms of clause 5.2.2. The list is not however an agreed list, even subject to the specific items in dispute. As with Coleford, it seems to me that the declaration which I make in this context should include a list of services for which the tenant is required to pay under clause 5.2. As with Coleford, it seems to me that the list will have to be non-exhaustive, but I would hope that the list will reduce the scope for further argument. So far as the absence of an agreed list of services is concerned, my decision is that the list of services contained in paragraph 1 of the Defendant's draft order should be used, as a non-exhaustive list of services falling within the terms of clause 5.2.

(ii) Bushbury – The alternative claim to a restitutionary remedy on the basis of unjust enrichment

376. It seems to me that the alternative claim for a restitutionary remedy on the basis of unjust enrichment is not required by the Defendant. I have decided, in the previous section of this judgment, that the services for which the Bushbury Tenants have to pay service charges pursuant to clause 5.2 of the Bushbury Tenancy include those services which were in dispute between the parties. The Defendant does not therefore have to resort to principles of restitution in order to recover the costs of these services, provided that the reasonableness criteria for the recovery of the costs of these services are satisfied.

377. I have considered whether, in case this matter goes further, I should make a decision on the claim in unjust enrichment, on the hypothesis that the costs of the particular services which were in dispute are not recoverable under the terms of the Bushbury Tenancy. I have decided that I should not make a decision on this claim. I say this principally because the claim, which is concerned only with the

provision of a few services, raises matters which require detailed individual consideration, of a kind better suited to Trial 2. I therefore defer to Trial 2 the alternative claim in unjust enrichment in Bushbury. For the avoidance of doubt, and depending upon when Trial 2 takes place and how matters stand then, this deferral includes the question of whether the alternative claim should be determined at all, if the position at Trial 2 remains that the alternative claim does not arise.

(iii) Bushbury – Are management costs recoverable?

378. As with Coleford, I can take this question shortly, based on my discussion of management costs in Valley View. It is not in dispute that the Bushbury Tenancy contains, at clause 5.2, an obligation on the part of the tenant to pay the various categories of costs referred to therein. I also understand it to be common ground that these costs must be reasonable. Applying *Waverley* it seems to me that the wording of clause 5.2 is wide enough to include the Defendant's own management costs of providing the relevant services. Applying my reasoning in Valley View, it is not, at least in principle, objectionable for the Defendant to calculate these management costs by adding percentages to the external costs of delivering the relevant services.

379. In case it matters, I do not think that the conclusion in my previous paragraph applies to the obligation to pay in clause 5.2.1. The obligation in clause 5.2.1 is an obligation to *"pay and indemnify"* the landlord against taxes assessments and duties. This wording does not seem to me to be apt to include any management costs incurred by the landlord in relation to such payments.

380. I therefore conclude as follows in relation to the question of whether management costs are recoverable under the terms of the Bushbury Tenancy.
    (1) Management costs are, in principle, contractually recoverable under the terms of the Bushbury Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in the Bushbury Tenancy.
    (2) This is not a decision that management costs are in fact recoverable in respect of the services identified in my previous sub-paragraph, in relation to the service charge years which are the subject of the counterclaim in Bushbury. There may be other defences to the claim for these management costs which fall to be considered in Trial 2, including in relation to whether the management costs qualify as reasonable costs.
    (3) I do not think that management costs are recoverable, so far as they may be incurred, in relation to the landlord's costs of dealing with payments made under clause 5.2.1.

(iv) Bushbury – Is the counterclaim for alleged arrears of service charge due in respect of the service charge year 2013/2014 statute barred?

381. The claim for alleged arrears of service charges in the Bushbury Amended Defence and Counterclaim includes a claim for an alleged balance due for the service charge year 2013/2014, in the sum of £10,342.05; see Amended Schedule 2A to the Bushbury Amended Defence and Counterclaim. The Bushbury Claim Form was issued on 15th January 2020. As with Coleford, this means that, for

limitation purposes, the counterclaim for alleged arrears of service charge is deemed to have been made on 15th January 2020; see Section 35(1)(b) of the Act.

382. Paragraph 21 of the Bushbury Reply and Defence to Counterclaim pleads that the claim for 2013/2014 is statute barred. No provision of the Act is pleaded, but I again assume that Section 5 of the Act is relied upon, which prescribes a six year period of limitation for a claim in simple contract. The document which created the Bushbury Tenancy was not under seal. The Bushbury Reply to Defence to Counterclaim denies that the relevant part of the counterclaim is statute barred. It is contended by the Defendant, in paragraph 6, that the relevant service charges were all demanded within six years of the issue of the Bushbury Claim Form.

383. The analysis of the running of the relevant six year limitation period is equivalent to the analysis in Coleford. The alleged arrears of service charge counterclaimed in Bushbury are said to have been payable pursuant to the various sub-clauses in clause 5.2. Sub-clauses 5.2.2 and 5.2.3 require payments to be made quarterly on demand. Sub-clause 5.2.4 requires payments to be made on demand. Sub-clause 5.2.1, so far as engaged in the present case, does not specify when payment is due, but I understand it to be common ground, and if it is not common ground I so decide, that payment falls to be made on demand. Accordingly, if one assumes that the sum of £10,342.05 is due from the 2013/2014 service charge year, the Bushbury Claimants will have been in breach of contract at the point when they failed to pay this sum in compliance with the obligation to pay the relevant payments falling due under clause 5.2. That point will not have occurred until a demand was made for the relevant sum comprising the figure of £10,342.05. As in Coleford, it seems to me that the breach of contract would probably have occurred shortly after receipt of the relevant demand, on the basis (although I again do not formally decide this point) that one implies a reasonable amount of time, albeit only a short period of time, for the Bushbury Claimants to receive a demand and deal with the logistics of payment. As with Coleford, I should also add that what I have just said assumes that the sum of £10,342.05 was either the sum demanded or part of the sum demanded by a single invoice. By reference to the invoices listed in Amended Schedule 1 to the Bushbury Amended Defence and Counterclaim it appears that the sum of £10,342.05 could not have been a sum falling due on a single invoice. It therefore appears that the present case is one where non-payment of the sum of £10,342.05, assuming that the sum was due and unpaid, will have engaged more than one breach of contract and, consequently, different limitation periods applying to different parts of the sum of £10,342.05.

384. Amended Schedule 2A to the Coleford Amended Defence and Counterclaim records that the combined sum of rent and service charges demanded for 2013/2014 was £24,820.93, of which £14,478.88 was paid, thereby generating the alleged arrears for that year of £10,342.05. Amended Schedule 1 to the Amended Defence and Counterclaim records the dates of invoices said to have been sent out for 2013/2014 and also records the dates on which the sums were said to have been received which, together, make up the total receipts of £14,478.88 for 2013/2014.

385. The pleaded position in Bushbury, in relation to Amended Schedule 1, is as it was in Coleford. The content of what was the original Schedule 1 was variously denied or not admitted in paragraph 8 of the Bushbury Reply and Defence to Counterclaim. The only exception was an admission that the Coleford Claimants accepted the payments in the receipts column as payments made by them, but without admission as to whether they related to rent or service charges. As in Coleford, the Claimants served a Request for Further Information dated 13th March 2021 seeking further information in respect of Schedule 1 (now Amended Schedule 1) including information about demands for payment. As with Coleford, I was not referred to any document which contained a proper answer to the requests raised.

386. In closing submissions, the Claimants took the same stance as in Coleford, namely that it was for the Defendant to satisfy the court that the claim for £10,609.42 was not statute barred, and that the Defendant had failed to do this on the evidence before the court. In closing submissions the Defendant took me to the first payment in Amended Schedule 1 for the 2014/2015 service charge year, which was a payment of £10,342.05. This must have been, so it was submitted, payment of the same sum left outstanding from the previous year. If this was correct, so the submission went, nothing was actually due for 2013/2014, with the result that no defence of limitation could arise. The Defendant also had a further point on Amended Schedule 1, which was that the last six invoices for 2013/2014, were all dated 13th March 2014; that is to say within six years of the critical date of 15th January 2020. Those last six payments added up to £10,342.05. As such, so the submission went, the outstanding sum of £10,342.05 must be taken to have accrued due against those six invoices. A failure to pay against any of those invoices would have been a breach of contract occurring within six years of 15th January 2020. To these two arguments I also understood the Defendant again to add the argument that it was entitled to and had appropriated later payments to earlier arrears, with the result that any sums which were outstanding prior to 15th January 2014 had been paid out of later payments, even if not by the first payment made in 2014/2015 year. I also assume, although this was not spelt out, that the Defendant maintained its argument, as in Coleford, that it was for the Claimants to prove that the relevant part of the counterclaim was statute barred, and not the other way round.

387. So far as the burden of proof is concerned, I repeat my discussion of this issue in relation to the Coleford. For the reasons set out in that discussion, and as in Coleford, I conclude that the burden is on the Defendant, as the effective claimant in relation to the claim for alleged arrears of service charge, to demonstrate that no part of its claim in Bushbury is statute barred.

388. I can take my analysis of Amended Schedule 1 more shortly than in Coleford. As in Coleford, there is no dispute that the figures, in red and in brackets, shown as payments in the penultimate column of Amended Schedule 1 were received in the amounts and on the dates shown in the penultimate column, both for the 2013/2014 service charge year and for the succeeding years.

389. Analysis of the figures demonstrates the following:

(1) The first invoice for 2013/2014 is dated 7th September 2013, for the sum of £6,205.24. The first payment shown for 2013/2014, made on 7th October 2013, is for £6,205.24.
(2) The next three invoices are also dated 7th September 2013, and add up to the sum of £6,205.23. The second payment shown for 2013/2014, made on 30th October 2013, is for £6,205.23.
(3) The next two invoices, both dated 27th November 2013, total £2,068.41. The final payment shown for 2013/2014, made on 17th December 2013, is for £2,068.41.
(4) The remaining invoices for 2013/2014 total £10,342.05. Two payments are recorded for 2014/2015. The first of these is a payment of £10,342.05, which was made on 4th June 2014.

390. As in Coleford, the obvious inference to be drawn from this analysis is that it is possible to match up, at least in relation to the payments which I have considered, the relevant payment with the relevant invoice or invoices. As a matter of common sense, it is difficult to draw any conclusion other than that (i) the payment of £10,342.05 which was received on 4th June 2014 was paid in discharge of the sums due on the last six invoices for the previous service charge year, and (ii) that the first six invoices for 2013/2014 were paid off by the payments which were made in 2013/2014.

391. As in Coleford, the position seems to me to be confused because Amended Schedule 1 to the Bushbury Amended Defence and Counterclaim shows the sum of £10,342.05 as apparently being due in respect of the 2013/2014 service charge year. This same figure is then imported into Schedule 2A as a figure apparently outstanding for 2013/2014. If however one carries out some analysis of the invoices and payments shown in Amended Schedule 1, it rapidly becomes apparent that there is a different inference to be drawn; namely that the figure of £10,342.05 which appears as outstanding for 2013/2014 was in fact paid, more or less when one would have expected it to be paid, early on in the 2014/2015 service charge year. What can also be inferred, on this basis, is that the sums which are shown as invoiced prior to the last six invoices in 2013/2014 were all in fact paid by the payments which appear in the penultimate column as receipts for 2013/2014.

392. Applying my analysis of Amended Schedule 1, it seems to me (and I so find) that the analysis demonstrates, on the balance of probabilities, that there is not in fact any sum which remains due and unpaid in respect of the 2013/2014 service charge year. I find that everything which is shown as having accrued due in the 2013/2014 service charge year was in fact paid off, by the payments shown as having been made in the 2013/2014 service charge year and by the first payment shown as having been made in the 2014/2015 service charge year.

393. The position would be different if some specific appropriation had been made, either by the Bushbury Partners or by the Defendant, which allocated payments in such a way as to leave the sum of £10,342.05 or some other sum outstanding from 2013/2014. There is however no evidence in the present case of any specific act of appropriation in relation to the relevant payments. In the absence of any such evidence, it seems to me that I am able to apply my own analysis to the

figures, with a view to determining, on the balance of probabilities, what was paid and what (if anything) was left unpaid at the relevant time.

394. In these circumstances I make the same finding as in Coleford, namely there is no sum outstanding which accrued due prior to 15th January 2014. It follows that if and in so far as the Bushbury Claimants may be in breach of contract, in consequence of a failure to pay service charges, no such breach of contract occurred prior to 15th January 2014. As such, I consider that the Defendant has succeeded in discharging the burden of demonstrating that its claim for alleged arrears of service charge in Bushbury is not affected by any defence of limitation.

395. As in Coleford it seems to me that the limitation issue in Bushbury is incorrectly stated. On the basis of my analysis of the figures, my conclusion is that there is in fact no counterclaim to be made for alleged arrears of service charge due in respect of 2013/2014, because everything which was demanded in that year has already been paid. Where this leaves the overall arrears position is, again, a matter for Trial 2.

396. It seems to me that the correctly stated conclusion in this context is that there is no defence of limitation in relation to Bushbury, because there are no sums which can be said to be outstanding from the 2013/2014 service charge year.

(v) Bushbury – What proportion of the Bushbury Building have the Bushbury Partners occupied in each of the service charge years to which the counterclaim relates?

397. I have already, in the context of Coleford, explained my approach to the issue of historic occupation. I can therefore proceed straight to my consideration of the relevant occupancy percentages.

398. The first question is which service charge years should be considered, bearing in mind my methodology; which is to exclude service charge years in respect of which I am satisfied that there is nothing outstanding.

399. The Defendant seeks determinations of historic occupancy in relation to Bushbury only in respect of three years; namely 2017/2018, 2018/2019, and 2019/2020. This leaves four years excluded, from and including 2013/2014. Of these four years, 2013/2014 can be excluded by virtue of my conclusion, in the previous section of this judgment which deals with limitation, that everything which accrued due in 2013/2014 was paid off. In relation to the remainder of these four years it is necessary to carry out an analysis of Amended Schedule 1 to the Bushbury Amended Defence and Counterclaim similar to that which I have carried out in relation to 2013/2014.

400. Carrying out that analysis, it seems to me that there is sufficient evidence of the same process which I have already noted in relation to 2013/2014; that is to say a correspondence between sums falling due and later payments. I am satisfied, on the balance of probabilities, that the Defendant is correct to submit that all the sums shown in Amended Schedule 1 as having accrued due up to and including the 2016/2017 service charge year were paid off. As I have already noted, the position is confused because Amended Schedule 1 to the Bushbury Amended Defence and Counterclaim appears to show a balance as due and owing for

2013/2014, 2014/2015, 2015/2016, and 2016/2017. Schedule 2A also shows balances apparently due and owing for the first three of these years. If however one carries out some analysis of Amended Schedule 1 it becomes possible to draw the equivalent conclusion to that which I have already drawn, in the context of limitation, in relation to 2013/2014; namely that all the sums shown as accruing due in the service charge years up to and including 2016/2017 have been paid off.

401. With this conclusion in place I turn to consider the question of the correct occupancy percentages for the three relevant service charge years (2017/2018, 2018/2019, and 2019/2020). The Defendant's figures, which are the subject of a non-admission by the Claimants, are as follows:
2017/2018 – 77.7%
2018/2019 – 79.44%
2019/2020 – 79.44%

402. The starting point is that there is agreement on the parts of the Bushbury Building currently occupied by the Bushbury Partners, subject to my reference to *"currently"* meaning the time when the Defendant made its counterclaims in Bushbury and/or the time when current occupation was admitted. There are plans of the ground and first floors of the Bushbury Building attached to the Bushbury Amended Defence and Counterclaim which show the extent of the occupation of the Bushbury Partners. That occupation was admitted by the Bushbury Partners. The only qualification to this is that I understand it to be agreed that a small storage area shown as part of the Bushbury Premises on the first floor plan should be removed from the area shown, by red hatching, as the Bushbury Premises. The area in question is a small rectangular area halfway up the left hand side of the first floor plan.

403. In this context it is convenient to note that Ms McAndrew drew this error to the attention of Vicki Mitchell of the Defendant by an email sent on 14th March 2019. By an email in reply sent the same day Ms Mitchell accepted the point and said that she would get the plan updated. It can be seen that the error was corrected because there is a later exchange of internal emails in September and October 2019 between employees of the Defendant where reference is made to the error, and to the need to correct the occupancy percentage from 81.76% to 79.44%. This correction had previously been identified in an internal email sent by Nzuki Bombasa to Ms Mitchell on 5th July 2019.

404. Going backwards in time Ms McAndrew was taken in cross examination to two plans dated January 2015 which showed the occupation of the Bushbury Partners in 2014. Ms McAndrew confirmed that those plans were correct in what they showed. The first floor plan showed only one room as occupied by the Bushbury Partners. The current occupation plan attached to the Amended Defence and Counterclaim (leaving aside the erroneously included storage area on the first floor) shows an additional room on the first floor as part of the Bushbury Premises. The explanation for this difference, as Ms McAndrew explained in cross examination, was that the Bushbury Partners took over this additional room at the end of 2017. The area of this additional room is shown on the 2015 plan as 15.45 square metres.

405. I should also add, in my reference to the 2015 plans, that the ground floor plan appears to show three small areas as being in the occupation of the Bushbury Partners. The current occupation plan, as I am calling it, for the ground floor shows these areas as retained areas, rather than as part of the Bushbury Premises, which I understand to be the correct current position. I suspect that the position was the same in 2014, but this was not clear from the evidence.

406. In 2016/2017 the Defendant instructed Montagu Evans in connection with a programme, described as a Lease Regularisation Programme, to sign up all the Defendant's tenants to uniform new leases. As part of this programme Montagu Evans were required to survey the properties in order to prepare heads of terms for the proposed new leases. In relation to Bushbury, Montagu Evans emailed Dr Clyde Luis on 1st March 2017 with heads of terms for the proposed new lease. The heads of terms included floor plans, which reflected *"our understanding of your occupation under plan reference 01100 & 02100"*. Dr Luis was asked to review both the heads of terms and the floor plans.

407. Turning to the heads of terms themselves, which were dated 23rd February 2017, the net internal area of the Bushbury Premises was given as 296.39 square metres, while the net internal area of the shared areas was given as 37.28 square metres. The heads of terms stated that *"the proportion of the total shared areas NIA which is attributable to the demise is 77.7%"*.

408. The same percentage of 77.7% can be found in two other documents. The first is a document which was described as an Occupation and Use Template, which I understand to have been a document which was used by the Defendant to calculate the proportion of net rental area occupied by the relevant GP practice. The Template in question was dated 24th January 2017, and recorded a percentage of 77.7% as the proportion of *"total exclusively lettable NIA"* attributable to the Bushbury Partners. The second document is the Annual Charging Schedule for 2017/2018, produced on 6th September 2017 which showed the percentage occupancy figure as 77.71%.

409. Given that the figure of 77.7% appears to have the support of Montagu Evans, who were instructed to survey the Bushbury Building in connection with the Lease Regularisation Programme, I find it difficult to see why this figure should not be accepted as the correct figure for 2017/2018. In relation to the increased figures for 2018/2019 and 2019/2020, the obvious explanation for the increase is that the Bushbury Partners took on the additional room on the first floor at the end of 2017.

410. I have already dealt, in the case of the Coleford, with the Claimants' general arguments that the court is not in a position to determine historic occupancy percentages without the assistance of a surveyor's report. As I explained, in relation to Coleford, I do not accept that I should decline to engage with the question of historic occupancy percentages. It seems to me that I should engage with that evidence, and make my decision as to whether the Defendant has, on the balance of probabilities, discharged the burden of proving the occupancy percentages for which it contends.

411. More specifically, the Claimants pointed to the fact that the occupancy percentages pleaded by the Defendant in Amended Schedule 2, for the service charge years from and including 2013/2014, showed considerable variation, without there being any evidence to explain this variation. This included the fact that the pleaded figures for 2018/2019 and 2019/2020 were 81.76%, which figure then reduced to 79.44% in the Joint Plans and Occupancy Tables.

412. So far as the last two service charge years are concerned, the documents to which I have referred above explain why the figure for the occupancy percentage is 79.44% and not 81.76%. So far as the years prior to 2017/2018 are concerned, I do not think that the varying percentages for these years undermine the figure of 77.7% for 2017/2018, which seems to me to be strongly supported by the available evidence.

413. On the evidence I conclude and find that the correct figure for the occupancy percentage for 2017/2018 is 77.7%, and that the correct figures for the occupancy percentages for 2018/2019 and 2019/20205 is, for each year, 79.44%. The figure for 2018/2019 and 219/2020 is not the same as the figure in Amended Schedule 2 for these service charge years, which is 81.76%. For the same reasons as I have set out in relation to Coleford, I am not minded to take the point that re-amendment of the Bushbury Amended Defence and Counterclaim is required in this respect. I have set out above why the correction from 81.76% to 79.44% was made.

414. In conclusion, I find that the proportion of the Bushbury Building which the Bushbury Partners have occupied in each of the service charge years for which I am making a determination (expressed in percentage terms) is as follows:
2017/2018 – 77.7%
2018/2019 – 79.44%
2019/2020 – 79.44%

415. As with Coleford, and for the sake of completeness, I should make it clear that if I had accepted the Claimants' submission that the evidence was insufficient to permit me to make any determinations as the correct figures for the historic occupancy percentages, I would not have thought it right to accede to the Claimant's submission that I should, in consequence, dismiss the Defendant's claims for declaratory relief in this respect. On that hypothesis I would have adjourned the issue of the historic occupancy percentages to Trial 2. My reasons for saying this are the same as those I have set out in relation to my discussion of historic occupancy percentages in relation to Coleford.

St Andrews – relevant history

416. As I have already explained, the St Andrews Building was originally designed and constructed by the St Andrews Partners and occupied as a building in their freehold ownership from 1995. In cross examination Dr Budden mentioned that the St Andrews Partners subsequently added a small extension to the original building, at ground and first floor level. It was not clear when this extension was added, but I include the extension in my references to the St Andrews Building (as from the time when the extension was built). Dr Budden said that the St Andrews Partners made only limited use of this extension. By a lease dated 6th

March 1996, the St Andrews Partners, or some of them demised a small part of the ground floor of the St Andrews Building to a Mr Brian Rose, for use as a pharmacy. I will refer to this part of the St Andrews Building, which I understand has remained in use as a pharmacy, as "the Pharmacy".

417. In 2004 the St Andrews Partners completed a sale and leaseback transaction whereby they sold the freehold interest in the St Andrews Building to the SPCT and took the grant of the 2004 St Andrews Lease. The St Andrews Demised Premises were referred to in the 2004 St Andrews Lease as the *"Premises"*, which expression was defined in the following terms:

> *"*[Premises] *means 664 Square Metres (NIA) shown for identification only edged red on the Plan together with all additions alterations and improvements thereto carried out during the Term and all Landlord's fixtures and fittings from time to time"*

418. There is a King Sturge valuation report, dated 25th July 2002, which valued the St Andrews Building for the SPCT. The report describes the area of the doctors surgery as totalling 663.9m^2, and the Pharmacy as totalling 78.87m^2. These figures confirm that the reference to 664m^2 in the definition of the St Andrews Demised Premises was a reference to the entirety of the St Andrews Building, including the extension (if it had by then been constructed), but excluding the Pharmacy. The valuation report does make reference to a recently constructed extension, so my assumption is that the extension had been constructed by 2002. The plans attached to the 2004 St Andrews Lease show the St Andrews Demised Premises as including the Pharmacy, but I understood it to be agreed between the parties that this was an error. The area occupied by the Pharmacy can correctly be identified from the plan annexed to the lease of the Pharmacy granted to Mr Rose. The same area is shown highlighted in yellow on a version of the ground floor plan annexed to the 2004 St Andrews Lease which the Defendant included in its opening skeleton argument for St Andrews.

419. It was apparent from the evidence that, following the grant of the 2004 St Andrews Lease, the St Andrews Partners did not make full use of the St Andrews Demised Premises. This resulted in negotiations between the St Andrews Partners and the SPCT, which appear to have commenced in 2010, for the grant of a new lease of a smaller part of the St Andrews Building. The commercial logic behind this proposal, from the point of view of the St Andrews Partners, was that it would result in a smaller area to be apportioned for service charge purposes, thereby reducing the service charge payable by the St Andrews Partners.

420. These negotiations do not appear to have proceeded quickly. I was referred to a letter dated 19th July 2011, written by Dr Lindsay, one of the St Andrews Partners, to a Mr James, a property manager for the SPCT. I quote the letter, which very much speaks for itself, in full:

> *"You will recall that from when we sold St Andrews Medical Centre to the PCT in 2004, no service charge was agreed or levied until 2010/2011 when we verbally agreed to pay a charge in exchange for the standard PCT lease. Mike Webster at a meeting at St Andrews Medical Centre on 10th August 2010 promised movement on the lease withing two to three weeks. Although*

we have had sight of a draft copy we have thus far had no approach from your solicitors.
We also met with yourself and Jackie Emmett on the 14th December 2010 when we had sight of a plan detailing occupation of the building. We jointly clarified occupation of several rooms which resulted in a reduction of our occupation. We have not as yet had sight of the revised plan. This plan detailing the percentage of occupation would be pivotal in calculating any service charge.
To compound our dissatisfaction regarding the current state of limbo we find ourselves in, we have received demand for payment of a service charge for 2011/2012 which is an increase of 30% on the figures paid in 2010/2011. This has come without explanation or negotiation,
As a result we will cease to pay any service charge with immediate effect until the lease is in place and reasonable service charges are agreed. We would be grateful if this could be given your urgent and full attention."

421. I assume that this letter did have the effect of galvanising the SPCT into action because heads of terms for the proposed letting were sent to the St Andrews Partners by Mr James under cover of an email of 1st December 2011. I note that the proposed letting was intended to be contracted out of the protection of the 1954 Act, and that the service charge was to be based on a percentage occupancy figure of 62.48%. Applying the floor areas given in the King Sturge report, and assuming that those floor areas comprised the entirety of the St Andrews Building, the equivalent percentage for the St Andrews Partners would have been around 89.4%.

422. The St Andrews Partners resumed paying service charges in 2012, but no new lease was granted by the SPCT prior to the transfer of the St Andrews Building to the Defendant. Nor were the negotiations for the grant of the proposed new lease continued with the Defendant.

423. So far as service charges were concerned the Defendant did not, as in other cases, move immediately to its policy of full costs recovery, in terms of service charges. The Defendant moved to full costs recovery in the 2015/2016 service charge year, which met with opposition from the St Andrews Partners. My reference to opposition from the St Andrews Partners does not do justice to the extent of the complaints which have been made by the St Andrews Partners, over the years, in terms of service charges, or to the responses made by the Defendant to those complaints. It will be understood that I am not going into any of the detail of these complaints or the Defendant's response because such detail, if it needs to be investigated, is for Trial 2.

424. The next proposal for the grant of a new lease came from the Defendant, which sent out heads of terms for a proposed new 25 year lease in March 2017. The heads of terms were sent out as part of what I understand to have been a programme, described as a Lease Regularisation Programme, initiated by the Defendant to sign up all its tenants to uniform new leases. This is the same programme as I have mentioned in relation to Bushbury. The Defendant instructed Montagu Evans for this purpose. The heads of terms identified the net internal area of the proposed demise to be 435.29m^2, with shared areas occupying

a net internal area of 279.33m^2. In terms of service charges the heads of terms stated as follows:

> *"The annual service charge for the building is currently approximately £149113, of which you are liable to pay 64.64%, based on the floor area that you occupy (please refer to the supplied floor plan). We envisage issuing service charge demands upon acceptance of these terms."*

425. These heads of terms were sent by Clare Buckley (then Clare Lancaster), the practice manager for St Andrews, to Dr Budden on 28th March 2017. Dr Budden replied by email the same day. His reply was trenchant and to the point:

> *"The use looks appropriate, but I aint signing this until we have also had a long chat with prop co about service charge. The rental value is less contentious as it is reimbursed by CCG but I would like Elaines assurance that that is the case before we commit to this document"*

426. It was put to Dr Budden in cross examination that what he was saying in this email was that, at that stage, he was in dispute with the Defendant about service charges and he was not willing to sign up to a new lease until that dispute had been resolved to his satisfaction. Dr Budden confirmed that that was absolutely correct.

427. By this stage the expiration date of the term of the 2004 St Andrews Lease, on 9th March 2019, was fast approaching. The position of the St Andrews Partners remained however that they would only sign up to a new lease once the service charge dispute had been resolved. Mr. Budden summarised the position of the St Andrews Partners in an email sent to Ms Buckley and Mr Doyle on 9th May 2018. This email came at the end of an exchange of emails between these individuals concerning the dispute over service charges. Although Dr Budden's email is lengthy, I consider it important to quote it in full:

> *"Hmm*
> *This building has been in the ownership of the PCT and latterly the NHS prop co for many years*
> *A lease is in place which expires in 2019*
> *We are keen to renegotiate a lease and clearly discussions need to occur before expiry of the current one*
> *We are adamant that the historical problems of communication and opaque billing schedules must be addressed before we can sign a new one*
> *We continue to question whether the charges are accurate and / or realistic and we have no confidence in the value for money we (or others for that matter) are getting through the current NHS prop co sub contractors*
> *At present it doesnt even appear that the sums we are being sent for water/rates/waste? from the CCG match the figures we are getting from NHS prop co.*
> *It would be great if both parties could liaise on that point because its nothing whatsoever to do with me. I merely pass the money along, and why I should have to do that is totally beyond me. It seems another opportunity for errors in billing / invoicing*
> *We have discussed this issue with legal representatives at this stage because this has to be addressed within a relatively short timescale*

The issue here is one of timescale and communication, which has been historically terrible
A paper and email chase going back years has demonstrated an inability to get any response in a reasonable timescale
Prop co have clearly accepted that records and comms going back beyond 15-16 are hopeless. In fact we can find no evidence of any schedules, nor have records of ever having been shown one or made aware of their existence.
It is clear that 15/16, 16/17 and 17/18 at least have shown some semblance of an attempt to talk, however email trails will continue to show long periods of inactivity and we dispute that the info given to date answers our chief concerns.
We do not accept that we have been given acceptable information in timely fashion
We still do not accept that the figures plucked from the air for management are realistic, The new survey will I'm sure demonstrate a schedule of works that screams lack of active management) and we have absolutely no doubt that the figures we are seeing in schedules represent either guesstimates and/or poor value for money.
Our legal advisers have also instructed us that we should not pay any of the requested sums at this stage"

428. On 4th July 2018 Jonathan Smith, then a Service Support Manager with the Defendant, with responsibility for the St Andrews Building, emailed Dr Budden and Ms Buckley seeking a meeting *"to try and resolve the below"*. The reference to *"below"* referred to a chain of emails which I understand to have included Dr Budden's email of 9th May 2018. The response from Ms Buckley to this proposal was as follows:

> *"As stated previously, BMA law are now dealing with this and I will pass on your details. We have ceased in negotiations with NHSP. Please do not contact us again directly with regards to this."*

429. The term of the 2004 St Andrews Lease duly expired on 9th March 2019. The St Andrews Partners remained in occupation of the St Andrews Premises. No terms for the grant of a new lease were agreed. The St Andrews Claimants sent their letter of action to the Defendant on 6th June 2019. There is no evidence of any negotiations between the parties over the terms of the grant of a new lease after 9th March 2019. Indeed, Dr Budden referred in cross examination to negotiations for the grant of a new lease breaking down in May 2018. Given the terms of Dr Budden's email of 9th May 2018, it seems to me that Dr Budden was right in this analysis of the position of negotiations.

430. Following the expiration of 2004 St Andrews Lease, the Defendant continued to invoice the St Andrews Partners for rent and service charges, and has continued to accept the payments which have been made by the St Andrews Partners. I should also mention some evidence of Lauren Ridgard to which my attention was drawn. Ms Ridgard is the Defendant's Facilities Service Manager for the St Andrews Building, and she was one of the Defendant's witnesses in St Andrews. She was not required to give oral evidence because her evidence, in her two witness statements, was unchallenged for the purposes of Trial 1. In her first

witness statement Ms Ridgard made reference to what she described as capital works which were being carried out to the side of the St Andrews Building. Ms Ridgard explained that the St Andrews Partners were only willing to allow the works to be carried out if the work was free to them. Ms Ridgard was able to confirm this, because the work fell under the Defendant's capital scheme, for which a charge was not made. Ms Ridgard concluded the relevant part of her witness statement by saying that, apart from these works, *"the practice has refused to speak with me about services generally whilst the legal case is ongoing"*.

St Andrews – discussion and determination of the issues

(i) St Andrews – tenancy at will or periodic tenancy?

431. I have already set out the relevant legal principles, as explained in *Javad* and *Erimus*, in my discussion on the equivalent issue in Valley View. As in Valley View there are two available alternatives; namely implied periodic tenancy (the Claimants) or tenancy at will (the Defendant). There is no claim of a licence.

432. The potential difference to Valley View is that the present case is one of holding over, rather than one of a party being allowed into occupation of land in anticipation of the grant of a formal lease. Given this potential difference, and because it was a case relied upon by the Claimants, I should also make reference to *Cardiothoracic v Shrewdcrest Ltd* [1986] 1 W.L.R. 368; a decision of Knox J which was also concerned with whether a period of holding over had resulted in an implied periodic tenancy or a tenancy at will.

433. The facts of *Cardiothoracic* were that the landlord, a medical institution owned premises which enjoyed the prospect of redevelopment, at an uncertain point in the future. The tenant was in the business of providing students with hostel accommodation. There were changes of identity in relation to both the landlord and the tenant, but nothing turned on these changes of identity and the judge was able to ignore them. It suited both landlord and tenant, on three successive occasions, to enter into short term lettings, each of which was excluded from the protection of the 1954 Act. The last of these excluded tenancies came to an end on 31st October 1983, at which point the landlord was not ready to redevelop the premises. Negotiations therefore commenced for a fourth short term letting. During this period successive extensions were negotiated to the third letting, up to 15th September 1985. During the same period a monthly rent was also negotiated and paid, at successive rates higher than in the original third letting. In relation to each of these extensions, the judge made the following finding of fact, at 371H:

> *"Each of these extensions was, I find, negotiated subject to a condition that the extension should be the subject of a tenancy agreement approved by the court, excluding the operation of sections 24 to 28 of the Landlord and Tenant Act 1954, and I find that it was understood and intended by both parties that until such order was obtained there would be no legally binding agreement between them, so that in principle at least both landlord and tenant were at any time free to resile from the negotiations."*

434. The tenant sought to argue that it was a tenant either under a concluded agreement for the grant of a tenancy or pursuant to an implied periodic tenancy arising from

the combination of continued possession after 31st October 1983, and the payment and acceptance of rent. On either hypothesis the tenant enjoyed the protection of the 1954 Act. Knox J rejected both arguments. The judge considered that, during the period of holding over, when the successive extensions were agreed, the parties were in one of the classic circumstances for the existence of a tenancy at will; namely holding over pending agreement on the terms of a new tenancy. The judge referred to the conditional nature of the negotiations which had taken place in the following terms, at 376H-377C:

> *"I have held that the landlord and the tenant were in a series of negotiations between 31 October 1983 and September 1985 and that all the extensions that were from time to time agreed during that period were agreed subject to a condition that an order under section 38(4) of the Landlord and Tenant Act 1954 should be obtained. The parties were therefore, in my judgment, throughout that period in one of those classic circumstances mentioned by Scarman L.J. Indeed, had the parties not given and accepted rent during this period the case would, in my judgment, have been effectively unarguable on behalf of the tenant. The absence of a separate specific "subject to contract" condition makes no difference to this conclusion, for there is, in my judgment, implicit in a condition that the tenancy agreement negotiated between the parties should be subject to the making of a court order under section 38(4) of the Landlord and Tenant Act 1954, a term that unless and until the court order is obtained no legally binding grant or acceptance of the tenancy should be made."*

435. Nor did the judge consider that this result was changed by the fact of rent having been given and received. As the judge explained, at 378B-C:

> *"In the typical case where the giving and receiving of rent leaves the court to infer the existence of a periodic tenancy it is on the footing that this is the interpretation which best fills the vacuum which the parties have left. Thus, in what used to be the ordinary, case of a tenancy unaffected by statutory prolongation or protection coming to an end, and the parties giving and receiving rent but not expressly agreeing on the creation of a new tenancy, the preferred solution that the law has adopted is a periodic tenancy, on the footing that that is what the parties must have intended or be taken to have intended. Ultimately it is the intentions of the parties in all the circumstances that determines the result of the giving and acceptance of rent."*

436. The judge stated his conclusion at 379F-H in the following terms:

> *"The tenant's interpretation of a concluded grant of a tenancy protected by the Landlord and Tenant Act 1954 seems to me less compatible with the intentions of the parties in agreeing upon tenancy subject to the approval of the court under section 38(4) and paying and accepting rent in accordance with the terms of those proposed tenancies before they came into force than is a tenancy at will. It is clearly established that it is legitimate to have regard to relevant statutory protection in determining whether or not the acceptance of rent is a factor from which a new tenancy could be created: see per Lord Scarman in Longrigg, Burrough & Trounson v. Smith (1979) 251 E.G. 847, 849. Once one takes into account the machinery of the Landlord and Tenant Act 1954 and the parties'*

knowledge of its operation it seems to me very clear that they did not intend to create a periodic tenancy pending the grant which both sides anticipated of a tenancy approved by the court under section 38(4). Nor do I see any compelling reason why the court should impute such an intention to them if, as is factually perfectly possible, they gave no serious thought to the legal repercussions of the payment and acceptance of rent."

437. Returning to the facts of the present case, the Claimants stressed the finding in *Cardiothoracic* that the agreed extensions in that case, beyond the expiration of the term of the third excluded tenancy, had all been agreed on the basis that they were conditional upon the grant of a further court order excluding the extension from protection. The result was effectively the same as a subject to contract stipulation, and prevented the creation of a binding agreement for the grant of a tenancy or an implied periodic tenancy. In their closing submissions, the Claimants sought to distil the following propositions from *Javad*, *Erimus*, and *Cardiothoracic*.

> *"21.1. The question of whether there is a tenancy at will or an implied periodic tenancy is always a question of fact that requires regard to all the circumstances of the case.*
>
> *21.2. The payment of rent does not of itself preclude a tenancy at will.*
>
> *21.3 If negotiations are ongoing at the time the tenant goes into occupation, that militates in favour of a tenancy at will.*
>
> *21.4. If the parties understand that either is free to walk away from negotiations, that militates in favour of a tenancy at will.*
>
> *21.5. Negotiations must be continuing in that both sides must intend the terms of occupation to be agreed.*
>
> *21.6. By extension, if that intention is, or becomes, one-sided, the negotiations will go into abeyance, and if that position remains the case for a significant period of time, they will deaden entirely."*

438. I do not see anything objectionable in the first, third, and fourth of these propositions, but I think that it is necessary to be careful in relation to the second, fifth and sixth propositions. In relation to the second proposition it is clear from the authorities that the payment of rent is a relatively neutral factor, in deciding whether a tenancy at will or periodic tenancy exists. I do not think that it is right to suggest, as the second proposition does, that a tenancy at will can exist in spite of the payment of rent. This seems to me to elevate the payment of rent to a position of importance which, it seems clear from the authorities, it no longer enjoys. Payment of rent is but one factor to be considered, when deciding what interest has been created when one party allows another into possession of land and rent is paid and accepted. Turning to the fifth and sixth propositions, the question, in all cases in this context, is what the parties intended. That question falls to be answered by reference to anything which was agreed and by reference to all the surrounding circumstances. As Nicholls LJ explained in *Javad*, in circumstances where one party is allowed into possession of land paying a weekly or monthly rent to the owner of the land, the inference reasonably and sensibly to be drawn may well be that the parties intended to create a weekly or monthly tenancy *"failing more"*; see Javad at 1012D-G. The same may apply in a holding over situation *"failing more"*. The question of what the parties intended is

therefore always acutely fact sensitive, and depends upon all the surrounding circumstances. In a case involving negotiations, it is important not to be rigid in what is required, in terms of the presence or absence of continuing negotiations. It is perfectly possible, in my judgment, for a tenancy at will to come into existence, notwithstanding that negotiations over the terms of a new lease have become severely drawn out or stalled. All depends upon the intention of the parties, collected from all the surrounding circumstances and any evidence of what they did agree. By the same token, I would not rule out the possibility, in the right set of circumstances, of a finding that the parties could be taken to have intended to abandon their negotiations and effectively to have agreed to commit themselves to a new relationship of landlord and tenant, based upon an implied periodic tenancy. I would only add that one would need a very particular set of circumstances, in a case involving negotiations for the grant of a new lease, before this conclusion would be a feasible one.

439. The Claimants argued, on the facts of the present case, that there were no further negotiations between the parties following the expiration of the term of the 2004 St Andrews Lease, and that during the period of holding over the Defendant continued to treat the St Andrews Claimants as its tenant. In factual terms, it seems to me that this argument is broadly correct. There were no negotiations during the period of holding over. Indeed, I think that it is possible to go further than that on the facts of the case. It seems to me, and I so find, that negotiations for the grant of a new lease effectively stalled in May 2018, when Dr Budden made it quite clear, in his email of 9th May 2018, that the St Andrews Partners would not be signing up to a new lease until the service charge dispute was resolved. If, which I do not think was the case, Dr Budden had not made the position clear in his email, Ms Buckley stated the position trenchantly in her email in response to Mr Smith's suggestion of a meeting in his email of 4th July 2018.

440. It is however important to note what the position of the parties was when the negotiations stalled. The negotiations did not stall because the parties could not agree the terms of the new lease, and recognised that the negotiations must be abandoned. What happened, and I so find, was that a stand-off arose. It is clear from the evidence that both parties still intended to enter into a new lease. This was clearly the objective of the Defendant and, for the St Andrews Partners, Dr Budden said this in terms (*"keen"* was the word he used) in his email of 9th May 2018. The problem was the service charge dispute. For their part, the St Andrews Partners were not willing to enter into the new lease until the service charge dispute had been resolved. Neither party was able or willing to find terms for the resolution of the service charge dispute which would unlock the route to the execution of a new lease. For the purposes of Trial 1 it is not necessary to make findings as to whether the respective positions of the parties were positions of unwillingness or inability or a combination of both, and I make no findings in this respect. The relevant point is that terms for resolution of the service charge dispute could not be found. Subject to resolution of the service charge dispute, it does not look as though the negotiation of the terms of a new lease would have been a difficult task, particularly as the St Andrews Partners would be negotiating a rent which they would not ultimately have to fund. The sticking point was, and indeed remains the service charge dispute.

441. It is also clear to me, and I so find, that the St Andrews Partners had no objection to the intended new lease being excluded from the protection of the 1954 Act. The 2004 St Andrews Lease had been excluded from protection, and both sets of negotiations for the grant of a new lease which did take place were concerned with the grant of a new lease which was intended to be excluded from protection.

442. In an important passage of evidence in cross examination Dr Budden accepted that there had been such a stand-off in existence (as I have described above), since the expiration of the term of the 2004 St Andrews Lease. Dr Budden also accepted that if it had been possible to get over *"the service charge hump"*, as it was dubbed by cross examining counsel, he would have expected the parties to have entered into a solicitor-drafted lease. In other words, and as I understood Dr Budden's answer, he would have expected the relationship between the parties, after 9th March 2019, to be governed by the grant of a formal new lease, if the service charge dispute could have been resolved.

443. In these circumstances I make the following findings (for the avoidance of doubt, references to the parties mean the Defendant, on the one side, and the St Andrews Partners, including the St Andrews Claimants, on the other side):
    (1) Negotiations for the grant of a new lease to the St Andrews Partners effectively stalled in May 2018. The negotiations stalled because of the service charge dispute.
    (2) A stand-off then came into existence, which continues to the present day. The St Andrews Partners were not willing to sign up to a new lease until the service charge dispute was resolved. The parties were unable and/or unwilling to find terms for the resolution of the service charge dispute.
    (3) The negotiations were not abandoned in favour of some alternative arrangement as from 9th March 2019. As from May 2018, and into the period of holding over after 9th March 2019, both parties still intended that their relationship, as from 9th March 2019, should be governed by the grant of a formal lease, which would be excluded from the protection of the 1954 Act. The stand-off prevented that intention being brought to fruition.

444. As with Valley View I keep in mind that one consequence of the St Andrews Claimants being found to have an implied periodic tenancy is that their occupation of the St Andrews Premises would enjoy the protection of the 1954 Act. That was not, as I have found, what the parties intended to apply to their relationship after 9th March 2019, any more than it had applied before that date.

445. I also keep in mind that the service charge dispute was not, and is not separate from the terms upon which the St Andrews Partners occupy the St Andrews Premises. Although the areas of dispute in this context have now substantially diminished, the parties were substantially in dispute over the scope and extent of the service charge provisions in the St Andrews Tenancy. This is part of the overall service charge dispute which has prevented the parties from achieving their mutual objective of a new lease. It would, as it seems to me, be somewhat odd to have taken the parties to have agreed to commit themselves to a new tenancy of any kind, beyond the expedient of a tenancy at will which would continue only at the will of the parties, in circumstances where they were at odds

on the scope and extent of the service charge obligations which would be included in any such new tenancy.

446. It seems to me therefore that the essential difficulty with the Claimants' argument is that it is too narrowly focussed, and fails to take account of all the surrounding circumstances. As I have explained, it is correct that there were no continuing negotiations for the grant of a new lease during the period of holding over. Indeed, on my findings, there was an absence of negotiations for a period of some months prior to the commencement of the period of holding over. As I have also explained however, it is necessary to look at the circumstances in which negotiations stalled, and the continuing intentions of the parties thereafter. In other words, it is necessary to consider all the surrounding circumstances. Once one does that, the absence of continuing negotiations, and the fact that the parties continued to deal with each other as landlord and tenant during the period of holding over, does not lead to the conclusion that the parties intended that a new periodic implied tenancy should come into existence.

447. The present case, as with Valley View, is not on all fours with *Javad* or *Erimus*. Nor is the case on all fours with *Cardiothoracic*. As with Valley View, I do not think that the differences are material. As I have said, the essential question, to be answered by reference to what (if anything) was agreed and from all the surrounding circumstances, is what terms the parties are to be taken to have intended to apply to the occupation by the relevant party of the relevant land.

448. Looking at all the surrounding circumstances in the present case, and bearing in mind the findings which I have made as to the intentions of the parties, in respect of the period after 9th March 2019, the answer to the question posed in my previous paragraph seems to me to be clear. The occupation of the St Andrews Premises by the St Andrews Partners is correctly interpreted as having given rise to a tenancy at will, which is still continuing.

449. I therefore conclude that the St Andrews Tenancy is a tenancy at will.

(ii) St Andrews - On the true construction of the terms of the St Andrews Tenancy, for which services do the St Andrews Claimants have to pay service charges?

450. In theory, there is nothing to consider under this heading, because management costs fall to be dealt with separately, and professional fees are for Trial 2. I think however that there is a need to identify what is being decided in this respect. It is also useful to set out the relevant provisions in the St Andrews Tenancy, as they will be relevant when I come to consider management costs.

451. It will be recalled that the parties are agreed that the terms of the St Andrews Tenancy, save for its status (as I have now decided) as a tenancy at will, are those contained in the 2004 St Andrews Lease. There are three clauses in the 2004 St Andrews which are relevant in this context. The first is clause 4.1.2, which contains the obligation of the tenant to pay the Service Charge. The second is the definition of the Service Charge. The definition is contained in clause 3.2, in the following terms:

> *"a fair proportion (to be determined by the Landlord's surveyor acting reasonably) of the cost and expense of maintaining and as necessary*

repairing rebuilding redecorating and renewing cleansing the Common Part ("the Service Charge")"

452. The third clause is clause 4.1.3, which requires the tenant to pay the following:
"To pay and discharge or in the absence of direct assessment to pay to the Landlord on demand a due proportion (determined by the Landlord at its discretion) of all rates taxes charges duties assessments outgoings and impositions whatsoever now or at any time during the Term charged rated assessed or imposed on or in respect thereof and to pay for all services utilities or amenities used by or available to the Premises (including all standing charges) and to indemnify the Landlord against any breach of the foregoing"

453. The Defendant's draft order seeks, at paragraph 2, a general declaration that the St Andrews Claimants are liable, as tenants under the St Andrews Tenancy, to pay, on demand, the Defendant's reasonable costs in providing (whether on a planned or reactive basis) a list of services, which are then set out. As in the other actions, the list of services is non-exhaustive. The Claimants' draft order, at paragraph 2.1, simply provides that the St Andrews Claimants are obliged to make payments to the Defendant pursuant to clauses 3.2, 4.1.2, and 4.1.3 of the St Andrews Tenancy.

454. As with Coleford and Bushbury I consider that it is desirable that the declaration made in respect of this issue should contain a list of services in respect of which the tenant under the St Andrews Tenancy is required to make payment, even if the list of services cannot be exhaustive. The Defendant's list of services in its draft order is not an agreed list, but there appears to be a reasonable degree of congruity between that list and the accepted services in the Claimant's colour coded schedule in relation to St Andrews.

455. In these circumstances I will make a declaration in the terms of paragraph 2 of the Defendant's draft order, including the non-exhaustive list of services included therein. This is subject to one point on the current drafting of paragraph 2. The current drafting, as I read it, leaves it ambiguous as to whether the tenant's obligation to pay derives from the three specific clauses which are agreed to have been imported from 2004 St Andrews Lease or from other implied obligations in the St Andrews Tenancy. The drafting should be revised to make it clear that the obligation to pay derives from the three specific clauses, as imported into the St Andrews Tenancy from the 2004 St Andrews Lease, and not from anywhere else.

(iii) <u>St Andrews – Are management costs recoverable?</u>

456. I refer back to my discussion of management costs in relation to Valley View. In this instance the question is whether management costs can be recovered as part of the costs which are recoverable as part of the Service Charge (as defined in clause 3.2) and/or as part of what has to be paid pursuant to clause 4.1.3. Applying *Waverley*, it seems to me that the wording of clause 3.2 is wide enough to include the Defendant's own management costs of providing the services referred to in clause 3.2.

457. In relation to clause 4.1.3, I do not think that the position is quite so straightforward. For this purpose it seems to me that it is necessary to divide clause 4.1.3 into two halves. The first half comprises the obligation to pay the rates taxes and other items, down to, and including the words *"in respect thereof"*. In my judgment this first half of clause 4.1.3 is not apt to include an obligation to pay management costs. What have to be paid are the specific items referred to (rates, taxes, etc.). The landlord's own management costs do not appear in the list of items which must be paid, either to a third party or directly to the landlord. Nor is there any wording which seems to me to permit the recovery of the landlord's internal management costs of dealing with these payments.

458. The second half of clause 4.1.3 contains the obligation to pay for all services utilities or amenities used by or available to the Premises, as defined in the 2004 St Andrews Lease. It seem to me appropriate to take this reference, as imported into the St Andrews Tenancy, to mean the premises demised by the St Andrews Tenancy (the extent of which I shall come to). Applying *Waverley*, the question which arises is whether the wording of the second half of clause 4.1.3, where it requires payment for all services utilities or amenities, is wide enough to include an obligation to pay the landlord's own management costs incurred in connection with the delivery of a particular service utility or amenity. In my view, the wording is not sufficiently wide to achieve this. The obligation is an obligation to pay *"for all services utilities or amenities"*. It is not an obligation to pay the landlord's costs incurred in the delivery of *"all services utilities or amenities"*.

459. As was stressed in *Waverley*, the ability to recover internal management costs depends upon an appropriately framed service charge covenant. I think that clause 3.2 is so appropriately framed. I do not think that clause 4.1.3 is so appropriately framed.

460. Applying my reasoning in Valley View, it is not, at least in principle, objectionable for the Defendant to calculate the management costs, so far as I have decided that they are within the scope of the tenant's obligations in the St Andrews Tenancy, by adding percentages to the external costs of delivering the relevant services.

461. I therefore conclude as follows in relation to the question of whether management costs are recoverable under the terms of the St Andrews Tenancy.
    (1) Management costs are, in principle, contractually recoverable under the terms of the St Andrews Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in clause 3.2 of the 2004 St Andrews Lease, as that clause is incorporated into the St Andrews Tenancy.
    (2) Management costs are not contractually recoverable, under the terms of the St Andrews Tenancy, in respect of items for which the tenant is required to pay by clause 4.1.3 of the 2004 St Andrews Lease, as that clause is incorporated into the St Andrews Tenancy.
    (3) So far as I have decided that management costs are, in principle, contractually recoverable under the terms of the St Andrews Tenancy, this is not a decision that such management costs are in fact recoverable in respect of the relevant services, in relation to the service charge years which

are the subject of the counterclaim in St Andrews. There may be other defences to the claim for these management costs which fall to be considered in Trial 2, including in relation to whether the management costs qualify as reasonable costs.

(iv) St Andrews - What is the current extent of the premises demised by the St Andrews Tenancy?

462. As with Coleford, the claim for a declaration as to the extent of the demised premises in St Andrews is now in dispute. As I have already recorded, the Claimants made an application in closing submissions to withdraw their admission, and challenge the Defendant's case on current occupation.

463. I again start with the pleaded position in St Andrews. Paragraph 18 of the St Andrews Amended Defence and Counterclaim pleads as follows:

> *"The parts of the Building occupied by the Claimants have varied over time. The parts of the Building currently occupied by the Claimants are shown hatched turquoise on the plan marked "Current Occupation Plan" annexed to this Amended Defence and Counterclaim."*

464. A current occupation plan is annexed to the Amended Defence and Counterclaim, comprising plans of the ground and first floors of the St Andrews Building ("the St Andrews Current Occupation Plans"). A large proportion of each floor is shown, by turquoise hatching, as being in the current occupation of the St Andrews Claimants. Paragraph 35 of the Amended Counterclaim counterclaims for various declarations including, at paragraph 35.2, a declaration *"As to the precise extent of the parts of the Building that Drs Sutherland, Tasker, Budden and Fletcher are entitled to occupy whilst holding over"*.

465. The pleaded response to paragraph 18 of the Amended Defence and Counterclaim is at paragraph 4 of the St Andrews Reply and Defence to Counterclaim, which is in the following terms:

> *"As to paragraph 18 it is admitted that the parts of the Building occupied by the Claimant has varied from time to time. However, the Defendant is put to proof in quantifying the Claimant's occupancy proportion from time to time as set out in Schedule 2. It is admitted that the turquoise hatched area on the plan annexed to the Defence and Counterclaim is an accurate reflection of the Claimant's current occupation."*

466. Paragraph 35.2 of the Amended Defence and Counterclaim is expressed to be admitted at paragraph 23 of the Reply and Defence to Counterclaim. The Reply and Defence to Counterclaim is dated 2nd September 2020 and bears a statement of truth signed by Dr Budden.

467. Pausing at this point it is important to keep in mind that the pleaded position which I have set out relates to current occupation, in the sense that I am referring to current occupation. In the case of St Andrews it does not necessarily follow that this establishes the extent of the premises demised by the St Andrews Tenancy, because the agreement that the extent of the premises demised by the relevant Tenancy corresponds to the premises occupied by the relevant practice does not apply. Putting the matter more simply, the admission of the extent of

occupation shown in the St Andrews Current Occupation Plans does not necessarily establish the extent of the premises demised by the St Andrews Tenancy.

468. In an Opening Note on Occupancy, and in written closing submissions, and in oral closing submissions, the Defendant drew my attention to a Response provided by the Claimants to a Request for Further Information. I believe that the Response was served on 25th March 2020, prior to the service of the original St Andrews Defence and Counterclaim. The Response contains the following request and response (**"the Holding Over Response"**):

> *"**Request:***
> *(6) Are the premises held over the same or different to the premises demised by the Lease and what changes to the extent of the premises occupied, if any, have there been since the grant of the Lease.*
> ***Response***
> *(6) The premises held over are the same as those demised by the Lease."*

469. This was therefore a formal acceptance by the St Andrews Claimants that the premises demised by the St Andrews Tenancy were the same as those demised by the 2004 St Andrews Lease. On this basis the Defendant submitted that the appropriate declaration to make, concerning the current extent of the premises demised by the St Andrews Tenancy, was that those premises are co-extensive with the premises demised by the 2004 St Andrews Lease (the St Andrews Demised Premises). If this submission is correct, it follows that arguments over the extent of occupation by the St Andrews Partners, while relevant to historic occupancy percentages, are not relevant to the extent of the premises demised by the St Andrews Tenancy. The point matters because the St Andrews Demised Premises, as they are identified in the 2004 St Andrews Lease and as they are shown on the plans annexed to the 2004 St Andrews Lease (subject to the removal of the mistakenly included Pharmacy) occupy a larger area than the areas shown on the St Andrews Current Occupation Plans as being in the current occupation of the St Andrews Partners.

470. The Claimants' answer to the Defendant's submission on the Holding Over Response was set out in their Closing Note on Occupancy. That answer was that the plan attached to the 2004 St Andrews Lease was wrong for various reasons. In paragraph 36 of the Note the Claimants made this submission:

> *"So, while there was no change in the occupancy post-expiry of the lease, the lease plan was wrong, and all parties conducted themselves so as to charge for the 'reality on the ground' (i.e., pharmacy and areas occupied by PCT / NHS PS to be excluded) rather than as per the occupancy plan. C therefore invites the court to disregard the lease plan and not to base any determination upon it."*

471. I do not follow this argument. The plans (ground and first floor) attached to the 2004 St Andrews Lease were only shown to be wrong in one respect; namely that the Pharmacy was not shown as excluded. I understood the parties to be agreed that the ground floor plan should have shown the Pharmacy as excluded from the St Andrews Demised Premises. If I have misunderstood the position, and the parties were not so agreed, I find that the ground floor lease plan was wrong in

this respect. Beyond this mistake however I cannot see that there was any other mistake in the lease plans. Nor can I see that any case has been made out, either on the basis of the conduct of the relevant parties, or otherwise, that the extent of the St Andrews Demised Premises was somehow varied from what had been demised on the original grant of the 2004 St Andrews Lease. It is clear that the St Andrews Partners have, over the years, occupied areas of the St Andrews Building which are not as extensive as the St Andrews Demised Premises, but I do not see that this has resulted in any variation of the St Andrews Demised Premises, as they were originally demised.

472. I therefore reject the Claimants' argument that the Holding Over Response should actually be interpreted as meaning that the Claimants remained in occupation of the same area as they had occupied prior to the expiration of the term of the 2004 St Andrews Lease. That is not what the Holding Over Response said. The Holding Over Response said that the premises held over were the same as those demised by the 2004 St Andrews Lease. As I have already stated, I do not accept that the premises demised by the 2004 St Andrews Lease (the St Andrews Demised Premises) can be treated as any less extensive than what was expressed to be demised by the 2004 St Andrews Lease.

473. I can see no reason therefore why the Claimants should not be held to the response which they gave on the question of the extent of the premises demised by the St Andrews Tenancy, with the consequence that a declaration should be made that the extent of those premises is the same as the extent of the St Andrews Demised Premises (the premises demised by the 2004 St Andrews Lease).

474. It will be appreciated that this conclusion means that the application of the Claimants to withdraw their admission of current occupation in St Andrews is strictly irrelevant, so far as the extent of the premises demised by the St Andrews Tenancy is concerned. The extent of the premises is settled by the Holding Over Response, not the admission of current occupation.

475. Nevertheless I will consider the application for withdrawal of the admission of current occupation, for three reasons. First, the question of current occupation, as I am using that expression in this context, is of some relevance to the question of historic occupation, which I will be considering in the next section of this judgment. Second, the position in St Andrews is not quite the same as in Coleford, in terms of the admission of current occupation. The difference in St Andrews is that I did hear a certain amount of evidence which was specifically directed to the issue of current occupation (as I am using the expression current occupation in this context). It seems to me that I should deal with that evidence, and its effect (if any) on the application to withdraw the admission of current occupation. Third, it seems to me that I should make a decision on the application, in case I am wrong in characterising the application as strictly irrelevant to the question of the extent of the premises demised by the St Andrews Tenancy. In this last respect I should record that the closing submissions on both sides were not as rigorous as they might have been in observing a clear demarcation line between the issue of the extent of the premises demised by the St Andrews Tenancy, and the issue of the extent of the occupation of the St

Andrews Building by the St Andrews Partners (current and historic). At times, the submissions on both sides appeared to confuse these two issues.

476. Before coming to the application itself, I should identify the evidence to which I have just referred. In the course of cross examination, Dr Budden was asked about the St Andrews Current Occupation Plans and some earlier plans from 2017 showing the alleged extent of the occupation by the St Andrews Partners in 2017. Comparison of the two sets of plans appeared to show an increase in occupancy between the 2017 plans and the St Andrews Current Occupation Plans. Dr Budden did not accept this and, in answer to a series of questions, principally from myself, gave an explanation of how the space was organised which was shown hatched turquoise on the St Andrews Current Occupation Plans. The essence of what Dr Budden was saying was that a number of the areas hatched turquoise on the St Andrews Current Occupation Plans were areas of plant, or common parts, or shared use which either should not have been hatched turquoise or arguably should not have been hatched turquoise. Dr Budden was taken to his statement of truth on the Reply and Defence to Counterclaim, which contained the admission of the St Andrews Current Occupation Plans. He said that he was clearly incorrect in signing the statement of truth, in the light of the oral evidence he had given, but said that he had believed that the St Andrews Current Occupation Plans were correct when he signed the statement of truth.

477. In passing, I should record that I accept that Dr Budden did make a mistake when he signed the statement of truth. Given his evidence in cross examination, I accept that Dr Budden would not have authorised the admission if he had given it proper consideration when he signed the statement of truth. That said, it does seem to me that Dr Budden should have taken much greater care than he appears to have taken, when considering the St Andrews Current Occupation Plans and approving the Reply and Defence to Counterclaim. It is essential that those who sign statements of truth, whether or not lawyers, take care to ensure that the content of the relevant document is correct, to the best of their knowledge and belief. I have not thought it right to take this particular criticism into account, in my consideration of the application to withdraw the admission. I have thought it right that the criticism should be recorded.

478. The Claimants sought to rely upon Dr Budden's evidence in relation to the St Andrews Current Occupation Plans in order to challenge the Defendant's case on the current occupation of the St Andrews Premises. The obvious problem which confronted them in that endeavour was the admission in the Reply and Defence to Counterclaim. Faced with this problem, the Claimants made the application to withdraw the admission, which I have already discussed in the context of Coleford.

479. The procedural position is the same as in Coleford. The Claimants' admission in St Andrews was made after the St Andrews action had been commenced, with the consequence that the Claimants require the permission of the court to withdraw the admission. I have already made reference to CPR 14.1(5), in my discussion in Coleford. I have also already made reference to Paragraph 7.2 of CPR PD14, which explains how the court is required to approach such an application. I need not repeat the list of specific factors to which the court is

required to have regard, in paragraph 7.2. The factors are set out in my discussion in Coleford.

480. As I have noted in my discussion of the application in Coleford, the application was not supported by any evidence. Nor were submissions made, in support of the application for withdrawal of the admission, which either addressed the factors in paragraph 7.2, or referred me to evidence in the trial which was relevant to the consideration of these factors. Again, this was not perhaps surprising. As I have already observed, the application to withdraw the admission was made in the course of closing submissions, and had the appearance of something of an afterthought.

481. In my judgment the position is the same as in Coleford. Looking through the factors in paragraph 7.2, all seem to me to point clearly to refusal of the application. Again, using the same lettering as in paragraph 7.2, I deal briefly with each factor:
    (a) The grounds upon which the application was made were left unidentified. Paragraph 5 of the Closing Note on Occupancy referred to instructions having been taken, *"since the close of the hearing"*. I have taken this to mean since the close of the evidence in the trial. It is a rather odd statement in the case of St Andrews, because I assume that the Claimant's plans showing their case on the current occupation of St Andrews are based on what Dr Budden said in cross examination. Potentially this might have been a point in the Claimants' favour. The Claimants might have argued that there was new evidence upon which they were entitled to rely; namely the relevant evidence of Dr Budden in cross examination. The obvious problem with any such submission would however have been that Dr Budden signed the statement of truth confirming the content of the St Andrews Reply and Defence to Counterclaim. If Dr Budden had evidence to give which contradicted what was shown on the St Andrews Current Occupation Plans, it must be assumed that he was well able to give that evidence from the outset of the St Andrews action. The relevant evidence given by Dr Budden in cross examination was plainly not new evidence which only came to light after the admission was made.
    (b) There was no suggestion of any conduct, either on the part of the Defendant or otherwise, which justified the application.
    (c) The question of prejudice to the Defendant was not addressed, but as in Coleford it does seem to me that it would unfair to the Defendant to find that an admission upon which it had assumed it was entitled to rely, all the way through to closing submissions in Trial 1, could then be withdrawn the Claimants. In particular, I assume that the Defendant went into cross examination of Dr Budden on the basis that, whatever arguments there might be about historic occupation, it could at least rely upon the admission, in terms of current occupation.
    (d) The question of prejudice to the Claimants was also not addressed. In this context the position might be said to be different to Coleford, because the Claimants can, at least, say that evidence was heard at the trial, from Dr Budden, which supported their case on current occupation. As such, the Claimants can say that they should not be shackled to their admission, when the evidence of Dr Budden points to a different factual position. This seems

to me to be a limited point. I say this because it was far from clear to me, hearing Dr Budden's evidence, what the true position was on current occupation. Dr Budden himself very fairly conceded that some of the areas to which he was referring might arguably be said to have qualified as being in the occupation of the St Andrews Partners. In overall terms, Dr Budden's evidence did not seem to me to establish that the admission was clearly wrong. Rather, the evidence suggested that there would have been matters to investigate further and argue about, if the admission had not been made. The relevant point seems to me to be that the evidence of Dr Budden did not clearly establish that the St Andrews Current Occupation Plans were wrong. Rather, the evidence raised matters which would have required further investigation and further evidence. Such further evidence was not available, and such further investigation was not feasible, because, right up to closing submissions, the admission was in place and was not the subject of any application for its withdrawal. In summary, I can see the possibility of prejudice to the Claimants, if the application is refused, but in my judgment that prejudice is limited, and cannot possibly prevail against all the factors which militate against allowing the application. It will also be kept in mind that I say all this while putting to one side the point that the extent of the premises demised by the St Andrews Tenancy is not, for the reasons which I have given, controlled by the extent of the current occupation of the St Andrews Building.

(e) In terms of timing, the position is the same as in Coleford. The application was made almost as late in the day as it could be, without explanation or justification for the delay in making the application.

(f) In terms of prospects of success, if I had granted permission for the admission to be withdrawn, there would have been a need for further investigation and further evidence, neither of which was feasible, given the timing of the application. If such further investigation and further evidence had been feasible and had been permitted, I do not consider it possible to say what the outcome would have been, in terms of the Claimants' case. What does seem clear to me is that holding the Claimants to their admission cannot be said to have deprived them of the opportunity to advance a case on current occupation which was clearly going to succeed. The position seems to me to have been far less clear cut than that.

(g) In terms of the administration of justice, I do not think that the position is quite on all fours with Coleford. There is the evidence of Dr Budden. Nevertheless, it is still clear to me that the interests of the administration of justice point firmly in favour of the application being refused. In my view, as in Coleford, there is a complete absence of the circumstances or grounds which would justify the grant of permission to withdraw the admission.

482. Having regard to all the circumstances of this case, and having particular regard to the factors listed in paragraph 7.2, it seems to me that the application for permission to withdraw the admission in St Andrews, so far as it is relevant to what I have to decide, in the context of the extent of the premises demised by the St Andrews Tenancy and in the context of historic occupation, must be refused.

483. It seems to me that there should be a declaration as to the current extent of the premises demised by the St Andrews Tenancy. It also seems to me that the

declaration should be based on the Holding Over Response. I will therefore make a declaration that the extent of the premises demised by the St Andrews Tenancy is the same as the extent of the St Andrews Demised Premises (the premises demised by the 2004 St Andrews Lease).

(v) St Andrews – What proportion of the St Andrews Building have the St Andrews Partners occupied in each of the service charge years to which the counterclaim relates?

484. It seems rather unfortunate that the historic occupancy percentages are in issue in St Andrews. I say this because the Defendant would have been within its rights to levy service charges using an apportionment based on the St Andrews Demised Premises. The St Andrews Demised Premises were the premises actually demised by the 2004 St Andrews Lease and, as I have decided, they are also the premises demised by the St Andrews Tenancy. The result of using an apportionment based on the St Andrews Demised Premises would have been a higher percentage than the percentages contended for by the Defendant based on what the Defendant says was the extent of actual occupation by the St Andrews Partners during the relevant service charge years As I have already explained, the Defendant has conceded, albeit while reserving its position as to the future, that the apportionment in respect of its counterclaim for alleged arrears of service charges should be made on the basis of actual occupation.

485. The Claimants are however contesting the Defendant's figures for the occupation percentages in relation to St Andrews, on the basis that they cannot be proved. This problem would not exist, if the Defendant had based its apportionment on the St Andrews Demised Premises, because their extent has been clearly established. In other words, it would appear, given the Claimants' stance, that the Defendant would have been better off if it had not made the concession, but had sought to stand on its rights. While I regard this situation as rather disappointing, it is the situation I have to deal with. I therefore put my views on the merits of this situation out of my mind.

486. I have already, in the context of Coleford, explained my approach to the issue of historic occupation. I can therefore proceed straight to my consideration of the relevant occupancy percentages.

487. The first question is which service charge years should be considered, bearing in mind my methodology; which is to exclude service charge years in respect of which I am satisfied that there is nothing outstanding.

488. The Defendant seeks determinations of historic occupancy in relation to St Andrews in respect of four years; namely 2016/2017, 2017/2018, 2018/2019, and 2019/2020. This leaves three years excluded, from and including 2013/2014.

489. 2013/2014 can be excluded at the outset. Amended Schedule 1 to the St Andrews Amended Defence and Counterclaim shows an apparent balance outstanding for 2013/2014 of £14,817.24. The same figure is then carried over into Schedule 2A for 2013/2014. I have already explained, in my discussion of the issues in Coleford and Bushbury, why this is potentially misleading. In the case of St Andrews the Claimants accept that there is no defence of limitation on the basis that the sums which would have been claimed for 2013/2014 have already been

paid off. I take this as an acceptance that the sums shown as falling due in 2013/2014 have been paid off. If however I have misunderstood the scope of the Claimants' concession on limitation, it seems to me clear, and I so find, that the sum of £14,817.24 shown as outstanding from 2013/2014 was in fact paid off by the first payment shown in Amended Schedule 1 as having been made in 2014/2015.

490. In relation to the remaining two years, namely 2014/2015 and 2015/2016, it is necessary to carry out an analysis of Amended Schedule 1 to the St Andrews Amended Defence and Counterclaim similar to that which I have carried out in relation to Coleford and Bushbury.

491. Carrying out that analysis in relation to 2014/2015, it seems to me that there is sufficient evidence of the same process which I have already noted in relation to 2013/2014; that is to say a correspondence between sums falling due and later payments. I am satisfied, on the balance of probabilities, that the Defendant is correct to submit that all the sums shown in Amended Schedule 1 as having accrued due in the 2014/2015 service charge year were paid off. If one carries out some analysis of Amended Schedule 1 it becomes possible to draw the conclusion that the position in relation to 2014/2015 is the same as what I understood to be the agreed position in relation to 2013/2014; namely that all the sums shown as accruing due in the service charge year 2014/2015 have been paid off.

492. I do not think that the same conclusion can safely be drawn, from the available evidence, in relation to 2015/2016. The sums which accrued due in 2015/2016 were substantial, and substantially overtopped the payments received in the same year. On the available evidence I do not think that it is possible to match up sums shown as falling due in 2015/2016 with payments received in 2015/2016 and succeeding service charge years. It follows that I am not satisfied that 2015/2016 is correctly excluded from the service charge years for which the Defendant seeks a determination of the historic occupancy percentage. The question of whether 2015/2016 was correctly excluded from the service charge years for which a determination of the occupancy percentage is sought is a question I will defer to Trial 2. If it turns out that 2015/2016 was incorrectly excluded by the Defendant, the determination of the correct occupancy percentage for that year will have to be dealt with in Trial 2.

493. With the above conclusions in place I turn to consider the question of the correct occupancy percentages for the four service charge years for which a determination of historic occupancy percentages is sought by the Defendant (2016/2017, 2017/2018, 2018/2019, and 2019/2020). The Defendant's figures, which are the subject of a non-admission by the Claimants, are as follows:
2016/2017 – 64.57%
2017/2018 – 64.57%
2018/2019 – 69%
2019/2020 – 71%

494. I have already dealt, in the cases of the Coleford and Bushbury, with the Claimants' general arguments that the court is not in a position to determine

historic occupancy percentages without the assistance of a surveyor's report. As I explained, in relation to Coleford and Bushbury, I do not accept that I should decline to engage with the question of historic occupancy percentages. It seems to me that I should engage with the available evidence, and make my decision as to whether the Defendant has, on the balance of probabilities, discharged the burden of proving the occupancy percentages for which it contends.

495. I start with 2016/2017. In dealing with the relevant history of St Andrews I have already explained that the St Andrews Partners were sent heads of terms by Montagu Evans for the grant of a proposed new lease, in March 2017, as part of the Lease Regularisation Programme. The heads of terms included a schedule of occupation and occupation plan. On 28th March 2017 Ms Buckley emailed the St Andrews Partners asking them to take a look at what had been provided by Montagu Evans for discussion at the next business meeting. In his email response, sent the same day, which I have quoted above, Dr Budden said that the use looked appropriate.

496. Turning to the heads of terms themselves, which were dated 27th March 2017, the net internal area of the St Andrews Premises was given as 435.29 square metres, while the net internal area of the shared areas was given as 279.33 square metres. The heads of terms stated that *"the proportion of the total shared areas NIA which is attributable to the demise is 64.57%"*. Later in the heads of terms, under the heading of service charges, the annual current service charge is stated to be approximately 64.4% *"based on the floor area that you occupy (please refer to supplied floor plan)"*. The percentage of 64.57% can also be found in an Occupation and Use Template document for St Andrews, which is dated 21st March 2017. This figure is given as the percentage proportion of *"total exclusively lettable NIA"* for the St Andrews Medical Centre.

497. It was put to Dr Budden that he had, in his email of 28th March 2017 effectively confirmed that 64.57% was the correct occupancy percentage. Dr Budden gave a guarded answer, which was yes *"As long as whoever measured it measured it correctly."*. Dr Budden also made the point that, at this time and in this email, his major concern was not occupancy percentages. I accept that this was the position, so far as Dr Budden was concerned. His trenchant email of 28th March 2017 demonstrates clearly that his principal concern was the amount of service charges, not the correctness of the occupancy percentage.

498. That said, the figure of 64.57% appears to have the support of Montagu Evans, who were instructed to survey the St Andrews Building in connection with the Lease Regularisation Programme. The figure did not cause Dr Budden any concern. Also of importance, in this context, is that in the table for St Andrews in the Joint Occupation Plans and Tables, the Claimants seek to undermine the figure of 64.57% by reference to the figure of 64.64%. This alternative figure is derived from the heads of terms where, under the heading of service charges, the annual service charge liability is described as *"64.64% based on the floor area that you occupy (please refer to the supplied floor plan)"*. The difference is a small one. What is important is that the available evidence points to the correct figure being either 64.57% or 64.46%. On the evidence the figure which I find to be the correct figure for 2016/2017 is 64.57%.

499. The Defendant's figure for 2017/2018 is also 64.57%. This figure was used in the Annual Charging Schedule for this year, without complaint. It is not suggested that there was any change in occupation by the St Andrews Partners as between this year and the previous year. In the Joint Occupation Plans and Tables the Claimants refer to a figure of 61.25% which can be found in an email sent by Ella Ozga of the Defendant to Ms Buckley on 20th December 2017. The figure is identified as part of a set of figures which are introduced by the words *"Finally, we have been advised by NHSE that you have received the following reimbursements recently:"*. I agree with the Defendant that the reference to this figure in this email does not provide a reliable basis for dislodging the figure of 64.57% which, if it was correct for 2016/2017, should also hold good for 2017/2018. On the evidence, I find that that the correct figure for the occupancy percentage for 2017/2018 is 64.57%.

500. Turning to the remaining two years, comparison between the floor plans sent to the St Andrews Partners by Montagu Evans in March 2017 and the St Andrews Current Occupation Plans (which are the subject of the Claimants' admission of current occupation), shows an increase in occupation by the St Andrews Partners. There is no evidence of any challenge to the use of the percentages applied by the Defendant to the service charge years 2018/2019 and 2019/2020. When Dr Budden was asked about these figures in cross examination, it was clear that he had no basis to challenge the figures. Mr. Budden's essential point was the same as the point he made in relation to 2016/2017; namely that his concern was the amount of the service charges, not the precise measurement of the premises occupied by the St Andrews Partners. In the Joint Occupation Plans and Tables the Claimants do not point to any documents which contradict the Defendant's figures for 2018/2019 and 2019/2020. The Annual Charging Schedules for 2018/2019 and 2019/2020 showed, respectively, the occupancy percentages of 69% and 71%, and were not challenged by the St Andrews Partners.

501. It is not clear why the occupancy percentage is slightly different (69% and 71%), as between these two service charge years. The likelihood is that the increase in occupancy which occurred in these years occurred in the course of a service charge year and, as was the case in Coleford, the St Andrews Partners were given a mitigated occupancy percentage to compensate them for the part of the service charge year which elapsed prior to the increase in occupation.

502. The evidence for 2018/2019 and 2019/2020 is somewhat sparse but the occupancy figures contended for by the Defendant do derive support from what I regard as the well-evidenced figures for the previous two service charge years. On the evidence I consider that there is sufficient for me to find that the correct occupancy figures for 2018/2019 and 2019/2020 are, respectively, 69% and 71%.

503. In conclusion, I find that the proportion of the St Andrews Building which the St Andrews Partners have occupied in each of the service charge years for which I am making a determination (expressed in percentage terms) is as follows:
2016/2017 – 64.57%
2017/2018 – 64.57%
2018/2019 – 69%

2019/2020 – 71%

504. As with Coleford and Bushbury, and for the sake of completeness, I should make it clear that if I had accepted the Claimants' submission that the evidence was insufficient to permit me to make any determinations as to the correct figures for the historic occupancy percentages, I would not have thought it right to accede to the Claimant's submission that I should, in consequence, dismiss the Defendant's claims for declaratory relief in this respect. On that hypothesis I would have adjourned the issue of the historic occupancy percentages to Trial 2. My reasons for saying this are the same as those I have set out in relation to my discussion of historic occupancy percentages in relation to Coleford. In the case of St Andrews I have in any event deferred to Trial 2 the question of the correct occupancy percentage for 2015/2016, should it turn out that a determination is required for that service charge year.

St Keverne – relevant history

505. As I have already recorded, the St Keverne Partners have occupied the St Keverne Premises since the later 1970s (specifically around 1978). The St Keverne Claimants say, in a Response to a Request for Further Information dated 20th March 2020, that the St Keverne Tenancy first came into existence in August 2012. The evidential basis for this claim, which was not disputed by the Defendant, was not clear to me.

506. The Claimants called only two witnesses specifically in relation to St Keverne. The first was Linda Donaldson, who was bookkeeper for the St Keverne Partners from 2008 to 2019. The second was Anita Dugdale, who has been the practice manager for the St Keverne Partners since 2012, and began with the practice as medical secretary in 2010. Ms Donaldson was able to give some evidence on the relevant dealings between the St Keverne Partners and their former landlord, the CIS PCT. Ms Dugmore's knowledge of this period was however much more limited. Notably, the Claimants did not call any of the St Keverne Partners as witnesses.

507. In her witness statement Ms Donaldson explained that, prior to the practice starting to receive reimbursement for rent/service charges, the PCT (I take this to be a reference to the CIS PCT or whatever other PCT may originally have owned the St Keverne Building) collected what Ms Donaldson referred to as the property charges by way of deduction from the practice income, via the monthly General Medical Services payment. Ms Donaldson said that there was no distinction between rent and service charges, there was just one single amount deducted each month. The practice was not invoiced for charges, but there was an annual statement of reconciliation sent to the practice manager, showing the breakdown of charges and then, if necessary, an adjustment for under/over payment would be made to the practice income. This was a different approach to that of other PCTs. What appears to have happened is that the CIS PCT deducted what was due from the payments which it made to the St Keverne Partners pursuant to their GMS contract. Historically therefore, the St Keverne Partners were not, as in other cases, required to pay what they were being charged in respect of their occupation of the St Keverne Building, and then to exercise such rights of reimbursement as they had in respect of those payments.

508. In the same part of her witness statement Ms Donaldson made reference to certain spreadsheets, which she had prepared, which showed practice income and expenditure for the years 2010-2011 and 2011-2012. The spreadsheets are heavily redacted, but the spreadsheet for each year shows, in separate rows, rent, health centre charges (as so described), and repairs and renewals.

509. The accounts for the practice were prepared by Francis Clark, a firm of chartered accountants. The accounts for the year ended 30th September 2013, while heavily redacted, show in section 10 of the notes to the accounts what are described as premises expenses, which consist of separate figures for (i) rent, (ii) rates, water and clinical waste, (iii) health centre charges (as so described), and (iv) insurance. Note 11 to the accounts for the following year, for the year ending 30th September 2014, shows the same classification under the heading of premises expenses. The same is true of the accounts for the year ending 30th September 2015.

510. Ms Dugmore gave evidence of a programme of major works carried out the St Keverne Building in 2013 by the PCT. She said that this was her only knowledge of what she called the services arrangements between the practice and the PCT. She gave evidence that the practice (the St Keverne Partners) were not charged for this work, which was funded by the PCT. Ms Dugmore also said that as part of her handover from the previous practice manager, she was informed that the practice just had to pay rent and rates, which were reimbursed by NHSE, although I assume that this reimbursement would formerly have come from CIS PCT.

511. The Defendant called four witnesses to give evidence specific to St Keverne, although one of these witnesses, Rachel Curno, was unable to attend to give oral evidence. Another of these witnesses was Karen Pellow, who joined the Defendant as a Senior Estates Manager in April 2013, having been transferred over from the CIS PCT. Ms Pellow was employed as a Service Delivery Manager between 2014 and 2018, and has been a Facilities Services Manager with the Defendant since 2018. Ms Pellow provided two witness statements; the second of which was served in response to the Claimants' evidence. In her second witness statement Ms Pellow explained that the major programme of works referred to by Ms Dugmore would have been completed under a capital funding project, the cost of which CIS PCT would not have looked to the St Keverne Partners to fund.

512. It is clear that the CIS PCT did deliver a wide variety of services to the St Keverne Building. Many of these services (maintenance and grounds and garden services as I understand the position) were provided by an organisation known as CHESS (Cornwall Health Estates and Support Services). The CHESS team was transferred across to the Defendant, and was taken in-house in October 2016.

513. In terms of charging, and although the evidence is rather vague, my understanding is that the Defendant followed its practice in other cases and, for the years 2013/2014 and 2014/2015, restricted its charges to those raised by the CIS PCT. Thereafter the Defendant moved to full recovery.

514. Prior to the year 2018/2019 the St Keverne Partners paid what was demanded by the Defendant; being both rent and service charges. They also made claims for reimbursement of what they were being required to pay. Arrears started to build up in 2018. A meeting took place at which the arrears situation was discussed, at the St Keverne Building, on 20th September 2018. The meeting was attended by Ms Dugmore, Ms Pellow, and a Mr Keeble. Mr. Keeble was another of the Defendant's witnesses for St Keverne. He is a chartered surveyor, and has been a Senior Property Manager with the Defendant since 2014. Following the meeting Ms Dugmore arranged payment of what had been identified in the meeting as the arrears, in the sum of £57,798.76.

515. In her witness statement Ms Dugmore said that she was told by the practice's accountant, after the September meeting, that she should only pay what the practice were reimbursed by NHSE, because the costs were going up a lot, and were too much for a small practice. This was what occurred, which resulted in the St Keverne Partners becoming substantially in arrears with what was being demanded by way of service charges.

St Keverne – discussion and determination of the issues

(i) St Keverne – Is the rent payable under the St Keverne Tenancy an all-inclusive rent (including any service charges payable) of £6,742 per quarter, or does the St Keverne Tenancy contain an express or implied obligation to pay for the services provided or alleged to be provided by the Defendant (in addition to the rent) and, if so, on what basis and for which services?

516. I have put the question of the tenant's liability first, because it is capable of having a substantial effect on the question of the landlord's liability to provide services. I start with the question of whether the rent payable under the St Keverne Tenancy is an all-inclusive rent.

517. While it is common ground that the St Keverne Claimants have a periodic tenancy of the St Keverne Premises (the St Keverne Tenancy), there is no document which contains or directly evidences the terms of the St Keverne Tenancy. In supplying the terms of the St Keverne Tenancy the test, as stated in *Javad*, is therefore the same as I have identified in relation to the equivalent exercise in Valley View and Coleford. What terms can the parties be taken to have intended to apply, bearing in mind what was agreed and bearing in mind all the surrounding circumstances?

518. There is no evidence of there ever having been an agreement for an all-inclusive rent reached between the St Keverne Partners and CIS PCT. Indeed, the available evidence contradicts the existence of any such agreement. The evidence which Ms Donaldson gave as to the way in which the CIS PCT charged for the St Keverne Building does not demonstrate the existence of an all-inclusive rent. The spreadsheets exhibited by Ms Donaldson to her witness statement show separate figures for rent, health centre charges, and repairs and renewals. I will come shortly to the question of what was meant by health centre charges, but for present purposes the relevant point is that the spreadsheets do not suggest, or evidence an all-inclusive rent. There are also the accounts for the practice for years ending in 2013 and 2014. The *"premises expenses"* in the accounts are not confined to rent, but include rates, water and clinical waste, health centre charges, and insurance. So far as the major programme of works referred to by Ms Dugmore

is concerned, I accept the evidence of Ms Pellow; namely that these were capital works, funded out of a different budget to which the St Keverne Partners were not required to contribute.

519. Moving to the period when the Defendant took over the St Keverne Building there is, again, no evidence of the Defendant ever having agreed with the St Keverne Partners that the rent would be all-inclusive. The Defendant did not charge on this basis, and there is no evidence, prior to the involvement of solicitors and the inception of this dispute, of any suggestion having been made to the Defendant that the rent was all-inclusive. Indeed, in the period when the St Keverne Partners were paying the rent and service charges demanded by the Defendant, there is evidence of the St Keverne Partners applying for reimbursement of rent, rates, water/sewerage, clinical waste, and (rather more surprisingly) insurance and management fees. The person responsible for making the reimbursement claims was Ms Dugmore.

520. There is particularly telling evidence in this context, comprising exchanges between the practice and its accountant, Luke Bennett of Francis Clark. In an email sent to Ms Dugmore on 24th March 2017, Mr. Bennett said this:

> *"Hi Anita*
> *I've looked through the property charges information I took away from our meeting, and enclose a schedule for your attention.*
> *I've broken down the charges between those being, and not being, reimbursed. I can't get the figures to agree precisely hence the difference of £1,030 shown on the schedule. Nevertheless it is close enough for this purpose.*
> *I've then listed in further detail the charges not being reimbursed, as it is these you are really interested in. What stands out is the figure of £28,092 for "Planned Preventative Maintenance" which looks excessive.*
> *Also on the high side is Electricity and Oil which together come to £6,514. I would normally expect a surgery of your size to have total light and heat costs of around £3,500 to £4,500.*
> *Hope this helps to take matters forward with NHS Property Services.*
> *Good luck!*
> *Luke"*

521. The obvious point to be made on this email is that there is no suggestion of the rent being all-inclusive. If the rent had been agreed to be all-inclusive, one would have expected the practice's accountant to be aware of that fact. If Mr Bennett was not aware of that fact, one would have expected Ms Dugmore to have made Mr Bennett so aware. This all the more so because Mr Bennett was, in this email, giving advice on challenging the quantum of service charge sought by the Defendant. If therefore there was even the possibility of arguing that the rent payable under the St Keverne Tenancy was all-inclusive, thereby providing the St Keverne Partners with a complete answer to the Defendant's demands for service charges, Mr Bennett's email was where one would expect to find this argument ventilated.

522. Ms Dugmore followed up this email with an email sent to the credit control department of the Defendant on 25th May 2017, which stated as follows:

> *"I have recently had a meeting with my Accountants and discussed the health centre costs.*
> *We went through the property charges information and I enclose a schedule for attention.*
> *We have broken down the charges between those being, and not being, reimbursed. We cannot get the figures to agree precisely hence the difference of £1,030 shown on the schedule. However we feel it is close enough for this purpose.*
> *We then listed in further details the charges not being reimbursed, as it is these we are really interested in. What stands out is the figure of £28,092 for "Planned Preventative Maintenance" which looks excessive. Please could you provide a breakdown of what this covers.*
> *Also on the high side is Electricity and Oil which together come to £6,514 and our Accountant feels a surgery of our size to have total light and heating costs of around £4,500.*
> *We look forward to hearing from you"*

523. Mr Bennett's advice is clearly evident in this email but, again, there is no sign of any argument that the rent payable under the St Keverne Tenancy was all-inclusive. This picture is confirmed by an earlier email exchange between Ms Dugmore and Mr Bennett in March 2016, where Ms Dugmore was reporting to Mr. Bennett on the response she had received to queries which she had raised with the Defendant. Mr. Bennett analysed the figure of £35,921.96 which the Defendant was looking to charge, and broke it down into its component parts; namely Hard FM, Soft FM, clinical waste, rent, electricity, rates, oil, and water. Mr Bennett identified the issues which, in his view, the practice needed to resolve. There was however no sign, either on Mr Bennett's part or on Ms Dugmore's part, of any argument that the St Keverne rent was all-inclusive.

524. There is also of course the meeting on 20th September 2018, at which service charges were discussed, and Ms Dugmore was advised of what was said to be due by the Defendant. Following the meeting Ms Dugmore arranged payment of the relevant sum, which was substantial (£57,798.76). In paragraph 16 of her witness statement Ms Dugmore described this meeting, and her reason for paying this sum, in the following terms:

> *"I remember that two people from NHS PS turned up at the practice unannounced on 20 September 2018 demanding payment. I still have the paper copy schedule that they gave me, which I have annotated with the date of the visit and the names of the people from NHS PS, being Patrick Keeble and Karen Pellow. I have retrieved the paper copy of this schedule to refresh my memory. The schedule is dated 17 September 2018 and sets out the amounts NHS PS were saying at the time were owed by the practice to NHS PS for years 2017-2018 and 2018-2019; I note the amount outstanding was £57,798.76. I also note that the schedule shows that nothing is outstanding until 2017-2018. I told them I didn't realise that we owed anything. I just panicked and paid them with what I was told was a debt. I think I paid NHS PS the full amount."*

525. I am unable to accept this evidence, in two respects. First, I do not accept that the meeting was unannounced, or that Mr. Keeble and Ms Pellow turned up out of

the blue. Both Mr Keeble and Ms Pellow contradicted this suggestion in cross examination and, in re-examination, Mr Keeble was taken to an electronic diary invitation which he circulated to Ms Pellow and Ms Dugmore in advance of the meeting. There was also an automated acceptance by Ms Dugmore, sent in advance of the meeting. Confronted with this evidence that the meeting was arranged in advance, Ms Dugmore accepted in cross examination that the meeting had been pre-arranged.

526. Second, I do not accept that Ms Dugmore was in a panic, either during the meeting or after the meeting, or when she paid what had been identified as due at the meeting. Mr. Keeble's evidence was that he had brought a charging schedule to the meeting, which was provided to Ms Dugmore. The document was very considerably annotated with manuscript notes. In cross examination Ms Dugmore accepted that the annotations were her annotations on the copy of the schedule provided to her at the meeting. The annotations contradict any impression of panic or pressure. Both Ms Pellow and Mr Keeble gave evidence, which I found convincing, that Ms Dugmore showed no sign of being in a panic or under pressure, and said nothing to that effect. In the aftermath of the meeting Ms Dugmore paid what was said by the Defendant to be due, without doing anything to convey any impression of panic.

527. In general, I prefer the evidence which Ms Pellow and Mr Keeble gave of the September meeting to the evidence of Ms Dugmore. I do not think that Ms Dugmore was being dishonest in her evidence. My assessment is that, in her desire to support the claim of an all-inclusive rent, Ms Dugmore had erroneously persuaded herself that circumstances existed in relation to the September meeting which, in reality, had not existed.

528. I have already made reference to various documents, and in particular the accounts of the practice, which record health centre charges. In relation to the accounts for the year ended 30th September 2015 Ms Donaldson did accept, in cross examination, that the reference to health centre charges in that document was a reference to what was being billed by the Defendant. In any event, it seems quite obvious to me that what were referred to as health centre charges, in documents coming into existence before and after the transfer of the St Keverne Building to the Defendant, were charges billed to the St Keverne Partners in respect of services provided to the St Keverne Partners or, to put the matter more simply, health centre charges were service charges.

529. Ms Dugmore did give evidence, in her witness statement, that she was told by her predecessor that the practice just had to pay rent and rates. Ms Dugmore was asked about this in cross examination. Her recollection was that her predecessor had been a Mrs Frances Hough, and that the conversation had taken place in June/July 2012. Ms Dugmore said that she had been told by her predecessor that *"you paid your rent and your rates and you don't pay for anything else"*. Ms Dugmore went on to say:

> *"Well it was all inclusive. She told me that it was all inclusive. Your rent and rates is all inclusive with your charges."*

530. Ms Dugmore was clear in this part of her evidence, and I am prepared to accept that she did have a conversation with her predecessor in the terms described. In my judgment however, this evidence does not provide any real support for the case that the St Keverne rent either was agreed or should be taken to have been agreed to be all-inclusive. I say this for three reasons. First, and most obviously, Ms Dugmore was not told that the rent was all-inclusive. She was told that the rent and rates were all-inclusive. Second, and also obviously, Ms Dugmore's predecessor was not saying that any agreement existed that the St Keverne rent or the St Keverne rent and rates were all-inclusive. That may have been the understanding of Mrs Hough, but it does not necessarily follow that the CIS PCT had agreed to this, or even had a similar understanding. Third, and more fundamentally, Ms Dugmore's predecessor was describing what had to be paid. This of course begs the question of what was correctly described as having to be paid. Given the peculiar charging structure which appears to have existed in relation to St Keverne, in the days of the CIS PCT, it seems to me that a practice manager could quite reasonably have said what Mrs Hough is described as saying, without thereby saying anything about what other sums might be payable, in addition to rent and rates, if other charges ceased to be subsidised by the CIS PCT.

531. In their submissions the Claimants laid considerable stress on an internal document of the Defendant, described as an FMDI (Facilities Management Data Initiative) Report. The report is described on its face as a revised draft, dated 5th August 2019, and its subject matter is St Keverne. I have previously explained, in my discussion of historic occupancy percentages in relation to Coleford, the provenance of this report and the equivalent report for Coleford. I have there explained the procedural back story to the St Keverne report, the upshot of which was that the Claimants were able to make use of the St Keverne report, notwithstanding that it was said to be subject to litigation privilege.

532. In terms of what the Claimants sought to take from the FMDI report, the Claimants submitted that it could be implied from the report that the Defendant had understood and accepted that it had inherited from the CIS PCT an arrangement whereby the St Keverne Partners only paid a fixed all-inclusive charge. The Claimants referred, in particular, to the following extract from the report:

> *"• In FY13/14 and FY14/15 NHS PS honoured the inherited charging structure from the PCT. In FY 13/14 and 14/15 the GP was charged the same all inclusive figure for the reimbursables (rent, rates, clinical waste & water), but nothing for non-reimbursable. The GP was able to claim the reimbursable elements from the commissioner and there is no debt owing for either year. We have been unable to clarify the occupancy for 13/14 and 14/15 (nor have the local Finance or Property Management Teams).*
> *• In FY 15/16 NHS PS changes the construct of billing to reflect the true cost of occupation. Invoices are broken down between Rent, Service Charge and FM. Whilst our data shows a shortfall of £1,503.03 for payments versus billings there appears to be no debt owing for FY 15/16. The occupancy is known to have been 90.74%"*

533. I do not think that the above extract from the report, or any other part of the report goes as far as the Claimants submitted. The report records the fact that the Defendant, for the first two years of its tenure as landlord, charged on the same basis as the CIS PCT. Indeed, I understand that this was the practice of the Defendant in all of the properties which it inherited from PCTs. In all such cases, I understand the approach of the Defendant to have been that charging on the basis of full recovery did not start until 2015/2016. The report does refer to the inherited charging structure, and does record that the St Keverne Partners were charged the same all inclusive figure for the reimbursables, but nothing for non-reimbursables. This is however a long way from an acknowledgment by the Defendant that the rent payable under the St Keverne Tenancy was in fact an agreed all-inclusive rent. The report does not say this. Nor would one have expected the report to say this, given that it is clear, from the evidence of the Defendant which I have heard in relation to St Keverne, that those dealing with St Keverne on behalf of the Defendant had little or no knowledge of what the arrangements had been prior to the Defendant taking over the St Keverne Building. Where the report refers to non-reimbursables, it says that they have not been charged, not that they cannot be charged.

534. The Claimants also sought to rely on an email sent by Rachel Curno on 2nd June 2016 to Sue Foster, who was a Credit Liaison Officer with the Defendant. The email refers to Ms Curno's *"main concern"* as being that *"the lease doesn't allow us to recover from the practice for the fees which NHSPS have added on."*. In the previous paragraph Ms Curno refers to there being "*a query outstanding as to whether the practice should be paying our overheads and mgmt. fees"*.

535. A witness statement was tendered on behalf of Ms Curno, but Ms Curno herself was unable to attend the trial to give oral evidence, with the result that the Claimants had no opportunity to cross examine her. I take the Claimant's point that this had the consequence that the Claimants could not ask Ms Curno about this email. I have difficulty however in understanding how such cross examination would have assisted the Claimants' case that the St Keverne rent is all-inclusive. It is quite obvious from this email that Ms Curno was not suggesting that the rent was or might be all-inclusive. Ms Curno's concern was whether the Defendant had the ability to charge for what Ms Curno referred to as overheads and management fees. Ms Curno did not know the answer to that question and, so far as she was referring to management fees, the question has remained outstanding to this trial.

536. The Claimants' difficulties in arguing for an all-inclusive rent were, it seems to me, brought out by the position it was forced to adopt in its submissions on this issue. Paragraph 2.1 of the Claimants' draft order seeks a declaration that the St Keverne Claimants' obligations to make payment to the Defendant is limited to an all-inclusive rent of £6,472.18 per quarter. This was the primary position of the Claimants. The Claimants' fallback position was set out in a second paragraph 2.1 in the draft order, which provided as follows:

> *"[If the Claimant's primary position is wrong: The Claimant is also liable to pay over leasehold reimbursement costs in relation to relevant services provided and expenses incurred by the Defendant pursuant to the General*

Medical Services (Premises Costs) (England) 2004 and 2013 Directives (to the extent received by the Claimant).]"

537. The purpose of this provision and, I assume, the reason for the adoption of this fallback position, was to meet the criticism that it would be very odd if the St Keverne Claimants were not obliged to pay for expenses in respect of which they were entitled to be reimbursed under the 2013 Directions. It will be recalled that the Claimants introduced a similar provision into their draft order in Coleford, again to meet the criticism that it would be very odd if the Coleford Cap operated to prevent reimbursable expenses having to be paid. It seemed to me however that the introduction of this provision, as in Coleford, brought out the difficulties in trying to argue that the parties must be taken to have intended that the financial obligations of the tenant under the St Keverne Tenancy should be subject to some apparently arbitrary restriction; whether comprising an all-inclusive rent, or some other kind of all-inclusive payment.

538. Drawing together all of the above discussion of the evidence, I return to the question of whether, bearing in mind what was agreed and bearing in mind all the surrounding circumstances, the parties can be taken to have agreed that the St Keverne rent would be all-inclusive. Taking into account all the evidence which I have received and heard in relation to St Keverne, I find and conclude as follows:
    (1) I can find no evidence that the parties, meaning the St Keverne Partners on the one side, and the CIS PCT and/or the Defendant on the other side, ever agreed that the rent payable under the St Keverne Tenancy would be all-inclusive.
    (2) On the evidence it seems to me to be quite impossible to find that the parties can be taken to have intended that the rent payable under the St Keverne Tenancy would be all-inclusive.
    (3) The above findings and conclusions hold good, whether it is being said that the rent payable under the St Keverne Tenancy is all-inclusive, or whether it is being said that the rent and other specific heads of payment are all-inclusive. I do not think that the St Keverne Tenancy contains any such provision.

539. I therefore conclude that the rent payable under the St Keverne Tenancy is not an all-inclusive rent.

540. This conclusion means that the question does arise as to whether the St Keverne Tenancy contains an express or implied obligation to pay for services provided or alleged to be provided by the Defendant and, if so, on what basis and for what services.

541. The Defendant's draft order, at paragraph 1, seeks the following declaration, in terms of the tenant's liability to pay for services:

"The Claimants are liable under the Tenancy to pay, on demand, the Defendant's reasonable costs of services reasonably provided, including (without limitation) the following services (whether provided on a planned or reactive basis)"

542. There then follows a non-exhaustive list of services.

543. The Claimants' draft order does not address the question of what obligation there is to pay for services, if the St Keverne rent is not all-inclusive. In closing submissions however, I understood the Claimants to accept that, if the rent is not all-inclusive, the St Keverne Claimants are liable to pay for services actually provided by the PCT; which I took to be a reference to the CIS PCT. This takes one to the Claimants' colour coded schedule in St Keverne. The colour coded schedule shows in purple, for the PCT period, a lengthy list of services, with only insurance and management fees shown in red. It will be recalled that purple means that the service was provided, but that the cost is not recoverable under the St Keverne Tenancy, while red means that the service was not provided, and that the cost would not be recoverable under the St Keverne Tenancy if the service had been provided.

544. The consistent purple listing in the colour coded schedule reflected the fact that the Claimants were arguing that the St Keverne rent was all-inclusive. I have rejected that argument. Accordingly, it seems to me that the items coloured purple, for the PCT period, in the colour coded schedule can be taken to be the subject of the Claimants' concession, in closing submissions, that the tenant under the St Keverne is liable to pay for the services actually provided by the PCT, if the rent is not all-inclusive.

545. The items shown purple in the colour coded schedule are broadly similar to the items shown in the list at paragraph 1 of the Defendant's draft order. So far as there is a difference, it seems to me that the Defendant's list should prevail. It seems to me that, once it is accepted that the tenant under the St Keverne Tenancy is liable to pay for services delivered to the St Keverne Tenancy, it is difficult to see why the list of services should exclude particular services which, by definition, will only have to be paid for if they are actually provided, and the cost of which will only be recoverable if the reasonableness criteria, in the Defendant's proposed formulation of the obligation to pay for services, are satisfied.

546. In passing I should mention that the Claimants' colour coded schedule for St Keverne, when dealing with the Defendants' period of tenure, listed a number of items in red which were listed in purple for the PCT period. The listing of these items in red denoted the Claimants' case that these services were not provided by the Defendant. It was however clear from the evidence, and in particular from the cross examination of Ms Dugmore that the red coloured services had continued to be provided by the Defendant, after it took over the St Keverne Building. I make a finding to this effect. I should however stress the limited nature of this finding. The question of the precise extent to which these and other services were provided by the Defendant, and questions concerning the reasonableness of the provision of services and the reasonableness of their cost are all for Trial 2.

547. The above analysis leaves two items outstanding. The first is management costs, which I deal with separately. The second is the cost of buildings insurance, which appears in the Defendant's proposed list of services, but is coloured red in the

Claimants' colour coded schedule for St Keverne. In cross examination Ms Dugmore confirmed that the St Keverne Partners had only ever arranged contents insurance. It is clear that the St Keverne Partners have never arranged buildings insurance for the St Keverne Building, and I find that they have not done so. Prior to the Defendant taking over the management of the St Keverne Building, and dealing with the buildings insurance, I assume that CIS PCT arranged buildings insurance for the St Keverne Building. It is not clear on the evidence whether the CIS PCT charged the cost of this insurance to the St Keverne Partners.

548. In relation to buildings insurance, it seems to me that there are two points to be made. The first point is that if one accepts, as I do, that paragraph 1 of the Defendant's draft order sets out appropriate wording for the content of the tenant's obligation to pay for services under the St Keverne Tenancy, then it seems to me that buildings insurance is perfectly capable of qualifying as a service reasonably provided, within the meaning of the paragraph 1 wording, provided that the cost is reasonable. As the attached list of services is non-exhaustive, it does not seem to me particularly to matter whether buildings insurance appears on the list of services or not. The second point is a variation of the first point. Given what is common ground between the parties, in terms of the tenant's obligation to pay for services, it seems to me that the parties must be taken to have intended that the landlord's costs of buildings insurance, provided that they satisfied the criteria of reasonableness in the payment obligation, should be paid by the tenant. It may be that St Keverne Partners were not charged the cost of insurance during the PCT era, but the arranging of buildings insurance is a basic part of the management of the St Keverne Building. I cannot see what objection there could have been, on the part of the St Keverne Partners, to paying for the cost of this insurance, provided of course that the cost is reasonable. Nor can I see that either party could have intended that the provision of this insurance, which was primarily for the benefit of the St Keverne Partners, as the persons using the St Keverne Building, should be left to the landlord to fund.

549. In conclusion, it seems to me appropriate to approve the wording set out in paragraph 1 of the Defendant's draft order as the wording of the declaration as to the tenant's obligation to pay for services in the St Keverne Tenancy. In theory this wording does not require a list of services to be attached, particularly where that list is non-exhaustive. As in the other actions where this point arises however, it seems to me that it is helpful to have a list of services included in the declaration, even though that list will have to be non-exhaustive. For the reasons which I have set out above, I approve the list set out in paragraph 1 of the Defendant's draft order as the list to be used for this purpose.

550. In summary therefore, my conclusions in respect of the questions considered in this section of this judgment are as follows:
    (1) The rent payable under the St Keverne Tenancy is not an all-inclusive rent, and does not include any service charges payable.
    (2) The St Keverne Tenancy contains an implied obligation on the part of the St Keverne Claimants, as tenants under the St Keverne Tenancy, to pay for the services provided by the Defendant. The obligation is an obligation to pay, on demand, the Defendant's reasonable costs of services

reasonably provided, including (without limitation) the services listed in paragraph 1 of the Defendant's draft order.

(ii) St Keverne – Is the Defendant obliged to continue to provide services under the St Keverne Tenancy and, if so, which of the services referred to in Amended Schedule 2 to the St Keverne Amended Defence and Counterclaim?

551. I can take these questions relatively shortly, as the answers largely follow from what has been agreed between the parties, and what I have decided in the previous section of this judgment.

552. The parties are agreed that there is to be implied into the St Keverne Tenancy an obligation upon the landlord to continue to provide services, but this agreement is qualified by three areas of dispute:
    (1) The Defendant's formulation of this obligation, in paragraph 3 of its draft order, contains the proviso *"unless the Defendant reasonably concludes that it is not necessary or appropriate to continue to provide one or more of those services at the Property"*. The Claimants' formulation of the obligation, in paragraph 2.2 of their draft order, omits this proviso, which is resisted by the Claimants. As in Coleford, I understood the Defendant's fallback position to be that if there was no proviso, then I should find that there is no obligation at all.
    (2) Second, each formulation of the landlord's obligation is accompanied by a non-exhaustive list of services which the landlord is obliged to provide. The lists are similar, but not identical. The Defendant's list is not set out in paragraph 3 of its draft order, but is incorporated by reference to paragraph 1 of the Defendant's draft order, where the list is actually set out. As I have already explained, paragraph 1 of the Defendant's draft order is the Defendant's formulation of the obligation of the tenant to pay for services.
    (3) Third, the Defendant does not accept that it is under any obligation to provide services at St Keverne, if in fact there is no obligation upon the tenant to pay for those services.

553. So far as the first of the above areas of dispute is concerned, the position seems to me to resemble that in Coleford. The evidence of the dealings between the parties in relation to Coleford does not disclose any evidence of an actual agreement between the parties that the landlord, being first the CIS PCT and then the Defendant, was under an absolute obligation to provide services. The history of the dealings between the parties does disclose, and I so find, that the CIS PCT would make the decisions as to what services were required for the St Keverne Building, and did not treat itself as subject to an unqualified obligation to provide a list of specified services. I find that this did not change when the Defendant took over as landlord of the St Keverne Partners.

554. In these circumstances I do not think that the parties can be taken to have intended that the St Keverne Tenancy should contain an unqualified obligation on the part of the landlord to provide a specified list of services. It seems to me that the parties can be taken to have intended that the St Keverne Tenancy should contain an obligation on the part of the landlord to provide services, but in terms which gave the landlord ultimate control over the particular services provided. Indeed, without such a qualification to the obligation, the landlord could find itself in the

position of being subject to a contractual obligation to provide a particular service, in circumstances where the relevant service was not reasonably required or could not, for some good reason, be provided.

555. The process of determining what the parties can be taken to have intended, in relation to the terms of the St Keverne Tenancy, is necessarily an imprecise one. There is no evidence that the parties ever agreed to the actual wording of the proviso which is set out in the Defendant's draft order. As in Coleford however this seems to me to miss the essential point, which is that the wording of the obligation contended for by the Defendant, including the proviso, does, in my view, best reflect what the parties must be taken to have intended, in terms of the landlord's obligation to provide services to the St Keverne Building.

556. Second, there is the question of the list of services to be identified as the subject of the landlord's obligation. It seems to me that it is necessary to have such a list, otherwise the content of the obligation will be unknown. Given that there does not seem to me to be much difference between the two lists put forward by the parties, and given that I have already approved the Defendant's list, for use in relation to the tenant's obligation to pay for services in the St Keverne Tenancy, I will approve the list which appears in paragraph 1 of the Defendant's draft order

557. As with Coleford, the use of the list from paragraph 1 of the Defendant's draft order is not ideal, because the list is identified as being non-exhaustive. As such, this list does not necessarily work as a list of the services which the landlord is obliged to provide. There may be other services which should be the subject of the landlord's obligation to provide services. I will leave this particular point to be addressed, if necessary, in consequential argument, following the handing down of this judgment, at the point when the declaration of the liability of the landlord to provide services comes to be finalised.

558. The third area of dispute does not arise, given my decision that the tenant is liable to pay for services under the terms of the St Keverne Tenancy.

559. I therefore conclude that the Defendant is obliged to continue to provide services under the St Keverne Tenancy. The terms of the obligation are as set out in paragraph 3 of the Defendant's draft order in St Keverne, including the proviso thereto. I also conclude, subject to the drafting point which I have left outstanding, that the services which are the subject of the Defendant's obligation to provide services are those listed in paragraph 1 of the Defendant's draft order.

(iii) <u>St Keverne – management costs</u>

560. I can take this question shortly, because the position seems to me to be the same as in Coleford. I have already set out the relevant law and my own reasoning in relation to management costs in Valley View. I have found that the St Keverne Tenancy contains an obligation on the part of the tenant to pay, on demand, the landlord's reasonable costs of services reasonably provided. This is an obligation in the same terms as that I have found to exist in the case of Coleford. Applying *Waverley* it is clear that wording of this kind is wide enough to include the Defendant's own management costs of providing the relevant services. Applying my reasoning in Valley View, it is not, at least in principle, objectionable for the

Defendant to calculate these management costs by adding percentages to the external costs of delivering the relevant services.

561. I therefore conclude as follows, in relation to the question of whether management costs are recoverable under the terms of the St Keverne Tenancy.
   (1) Management costs are, in principle, contractually recoverable under the terms of the St Keverne Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in the St Keverne Tenancy.
   (2) This is not a decision that management costs are in fact recoverable in respect of the services identified in my previous sub-paragraph, in relation to the service charge years which are the subject of the counterclaim in St Keverne. There may be other defences to the claim for these management costs which fall to be considered in Trial 2, including in relation to whether the management costs qualify as reasonable costs.

Should the Charging Policy Declarations be made?

562. There are two broad issues to be determined in the context of this question. The first broad issue is whether, given the decision made by the Chief Master in the 2020 Judgment, it was actually open to the Claimants to pursue their claims to the Charging Policy Declarations in this trial. The second broad issue, assuming that the claims can be pursued notwithstanding the 2020 Judgment, is whether the Charging Policy Declarations should be made. I start therefore with the first of these issues.

563. Both parties referred me to the summary of the principles governing the ability of a party to relitigate an issue (res judicata if the Latin term is used) set out by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160. At [17] Lord Sumption summarised the position in the following terms:

> *"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res*

> *judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197—198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."*

564. The Defendant advanced two arguments in support of its case that the Claimants were not, by virtue of the 2020 Judgment, entitled to pursue their claims to the Charging Policy Declarations. The first argument was that the claims for the Charging Policy Declarations in the five actions were all the subject of cause of action estoppel. This argument invoked the first principle identified above by Lord Sumption. The relevant estoppel is cause of action estoppel, rather than issue estoppel because, so the Defendant's argument ran, the Claimants' claims in the five actions were comprised of the claims for the Charging Policy Declarations. No other relief was sought by the Claimants in the five actions. The Chief Master had ruled upon those claims, by the 2020 Judgment and as such, so the Defendant's argument ran, the Claimants' cause of action in each of the five actions had been determined on a final basis. The second argument was that even if there was no cause of action estoppel, it was still an abuse of process for the Claimants to attempt to relitigate the claims for the Charging Policy Declarations in circumstances where, so the Defendant's argument ran, nothing had changed since the 2020 Judgment. I understood this second argument to invoke the final principle, or *"more general procedural rule"* identified by Lord Sumption in [17] above.

565. The argument that the Claimants were not entitled to proceed with their claims for the Charging Policy Declarations, on the basis that the claims were either subject to cause of action estoppel or were an abuse of process, only really developed in the course of Trial 1. The Defendant's skeleton argument for Trial 1 did take the point that the claims had been determined by the Chief Master, but did not articulate in terms the arguments which are now relied upon. Those arguments were only properly developed in closing submissions. I have also had the opportunity to read the skeleton argument which the Defendant submitted for the hearing of the applications for judgment on admissions before the Chief Master, which took place on 17th November 2020. It is interesting to note that the skeleton argument argued the Defendant's case on the basis, or at least principally on the basis that it was not appropriate for the Chief Master to deal with the claims for declaratory relief in advance of trial.

566. I do not mention these matters by way of criticism of the Defendant's conduct of this part of the argument. My point is that, so far as I can see, both parties appear to have conducted the five actions, following the 2020 Judgment, on the basis that it was still open to the Claimants to pursue the claims for the Charging Policy Declarations at trial. As against that, the 2020 Judgment is not expressed as a decision that it was not appropriate for the declaratory claims to be dealt with in advance of trial. Instead, the Chief Master made a decision that the Charging Order Declarations should not be made, for the reasons which were summarised in the 2020 Judgment, at [56]. It was on the basis of those reasons that the Chief Master decided that the applications should be dismissed.

567. The question of whether the 2020 Judgment did create a cause of action estoppel has proved surprisingly difficult to resolve; principally because there appears to be no direct authority, or at least none drawn to my attention, which gives any direct guidance on this question. The applications were made pursuant to the provisions of CPR Part 14; specifically pursuant to CPR 14.3. The Claimants referred me to the note at 14.3.2 in the 2022 edition of the White Book (at page 571), which gives guidance on the effect of Rule 14.3. The note makes the point that where a party has made an admission of fact, Rule 14.3 enables the court to give the applicant such judgment as they are entitled to on the admission, without waiting for the determination of any other questions between the parties. The note does not however explain the status of a decision on an application under Rule 14.3, where the application is dismissed on the basis that the relevant relief should not be granted.

568. The Defendant referred me to *Fidelitas Shipping Co Ltd v V/O Exportchler* [1966] QB 630. The case concerned a dispute over a claim for demurrage in relation to a shipment of grain. The claim of the shipowners for demurrage was referred to arbitration, in which two of the issues were whether a cesser clause in the relevant charterparty had the effect of excluding the claim for demurrage and, if so, whether the cesser clause had been the subject of a waiver. By an interim award the arbitrator decided that the claim was not excluded by the cesser clause. That decision was however overturned by Megaw J, who held that the claim was excluded by the cesser clause. The decision of Megaw J was upheld by the Court of Appeal. In the proceedings in respect of the interim award the point on waiver was not taken by the owners. When the case was remitted back to the arbitrator, following resolution of the issue which was the subject of the interim award, the owners sought to maintain their argument that the cesser clause had been the subject of a waiver. The Court of Appeal decided that the owners could not do this. They held that the effect of the decision of the court on the interim award of the arbitrator was to create an issue estoppel in relation to the issue of whether the cesser clause excluded the claim for demurrage.

569. At 640C Lord Denning MR expressed the relevant law in the following terms:

> *"The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see King C v. Hoare. 11 But within one cause of action, there may be several issues raised which are*

necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again."

570. At 642B-C Diplock LJ (as he then was) expressed the relevant law in the following terms:

"In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence:"

571. On the same theme the Defendant also referred me to *Chanel Limited v Woolworth* [1981] 1 WLR 485. The question in that case was whether the second defendants to the action could be discharged from undertakings which they had given, as part of a consent order standing over a motion for interlocutory relief until trial. The second defendants argued that a subsequent decision of the Court of Appeal and recently obtained evidence meant that the plaintiffs had no prospect, at trial, of obtaining relief in the nature of what was provided for by their undertakings, with the consequence that the second defendants should be discharged from their undertakings. At first instance Foster J refused to release the second defendants from their undertakings. The matter came before the Court of Appeal on an application for leave to appeal against this decision. Leave to appeal was refused. In giving judgment on the application for leave to appeal Buckley LJ, with whose judgment the other members of the Court of Appeal agreed, said this at 492H-493A:

"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position. The Revlon point was open to the defendants in April 1979, notwithstanding that this court had not then decided that case. Some at least of the new evidence was readily available to them at that time."

572. The Claimants also referred me to *Laemthong International Lines Co. Ltd v Artis* [2004] EWHC 2226 (Comm). The case raised the issue of whether a claimant could mount a renewed claim for a freezing injunction, in circumstances where

an earlier application for a freezing injunction had been made, on a without notice basis, and refused. Following a review of certain authorities, Coleman J said this, at [24]:

> *"24. In my judgment, the result of the reasoning in these two decisions is as follows. In the field of without notice applications for a pre−trial discretionary remedy, such as a freezing order, if a claimant's first application is refused, he may if he chooses, appeal to the Court of Appeal. That, at least, is clear. If, however, he then issues a second application to a judge, the judge would have to take a threshold decision, namely whether the character of the second application made it appropriate that he should entertain it. That would be a discretionary exercise.*

573. In terms of the exercise of that discretion, Coleman J provided the following guidance, at [24]:

> *"Normally a factor of great, if not determinative, weight would be whether on that second application new evidence or other matters were to be brought to the court's attention which had not been before the court on the first application and which were substantially material to the exercise of the court's discretion in favour of the claimant. In such a case the judge might conclude that the interests of justice under the CPR overriding objective outweighed the public policy considerations of conservation of judicial resources in the interests of other court users under the overriding objective. Where, however, a second application introduced nothing that was not before the court on the first application it would normally be the case that the discretion to hear that application would not be exercised in favour of the claimant. He had made the identical application on the same materials. That had been rejected and he had not availed himself of the opportunity to appeal that decision. Any further hearing would therefore simply be in substance an appeal from the first decision. In as much as it would simply be a re−run of the previous hearing in the hope that another judge would arrive at a different conclusion, it would be using a commercial judge to provide a facility which was properly the function of the Court of Appeal. That, in my view, would be an abuse of process in the sense that it would be an impermissible use of the resources of the court."*

574. The above authorities are helpful on the question of whether the claims for the Charging Policy Declarations constitute an abuse of the process of the court, given the decision of the Chief Master. I find them less helpful however on the question of whether the decision of the Chief Master has created a formal cause of action estoppel.

575. I find it easiest to approach these questions by taking first the argument that the pursuit of the claims for the Charging Policy Declarations at this trial is an abuse of the process of the court. In my view the pursuit of the claims in this trial is not an abuse of the process of the court. I say this for the following reasons.

576. The starting point is that the hearing before the Chief Master was not the hearing of a preliminary issue in the five actions. It was the hearing of the applications for judgment on admissions. These were interim applications. If they failed, the

outcome was the dismissal of the applications, as opposed to the dismissal of the Claimants' claims in the five actions. This is borne out by the terms of the orders which were made on the applications. Each order recited the relevant application for judgment on admissions, and went on to order the dismissal of the relevant application, accompanied by an order that the Claimants pay the costs of the application. There was no dismissal of the Claimants' claims for declaratory relief in the relevant action, and no order that the Claimants pay the Defendants' costs of the action (excluding the counterclaim).

577. The next point is that the evidence before the Chief Master on the hearing of the applications was limited. The Chief Master had before him two witness statements made by Mr Stephen Meade, of the Claimants' solicitors, and a first witness statement of Dr Gaurav Gupta. Dr Gupta is a GP and a partner in Faversham Medical Practice. He is also the Premises Policy Lead of the General Practitioners Committee of the BMA and, in that capacity, has been closely involved in the service charge issues which have generated these five actions. The limited nature of the evidence before the Chief Master was not surprising. The applications were interim applications for judgment on admissions. The hearing of the applications was not a trial, and neither the Claimants nor the Defendant could reasonably have been expected to assemble or deploy all of the evidence which they might wish to rely on at a full trial. I can find no suggestion in the 2020 Judgment that the Claimants were expected or required to treat the hearing of the applications as if it was the hearing of a preliminary issue, where the Claimants would have been required to advance all of their evidence and arguments on a final basis.

578. Turning to this trial itself, there are two points to be made. First, and most obviously Trial 1 was not an attempt by the Claimants to renew their failed application for judgment on admissions. Trial 1 was the trial of, amongst other issues, the Claimants' claims for the Charging Policy Declarations. Second, the evidence before me bore no resemblance to the evidence before the Chief Master. The evidence before the Chief Master was limited to three witness statements. In Trial 1 the Defendant called the evidence of seven witnesses who gave contextual (non-specific) evidence, in addition to a large number of practice specific witnesses. The Claimants called a large number of practice specific witnesses and, in terms of contextual evidence, called further evidence from Dr Gupta in the form of his second and third witness statements. Substantial parts of all this evidence were referred to and relied upon by the parties in relation to their arguments over whether the Charging Policy Declarations should be made.

579. I can illustrate this difference by the example of Dr Gupta's evidence. As I have noted, the Claimants served second and third witness statements of Dr Gupta as part of their evidence for trial. Those witness statements contained contextual evidence, a substantial part of which was directed to the issue of whether the Charging Policy Declarations should be made. In particular, Dr Gupta exhibited to his second witness statement the letter which the BMA sent to GPs communicating the outcome of the applications for judgment on admissions. This letter was accompanied by a template letter which the BMA had prepared for use by GP practices in their dealings with the Defendant in respect of service charges. I regarded both of these documents, and what Dr Gupta had to say about

them as being important to the issue of whether the Charging Policy Declarations should be made. Dr Gupta's evidence was not challenged by the Defendant, but the Claimants tendered Dr Gupta to give oral evidence, in the event that I had any questions to put to Dr Gupta. I took up this invitation and put my questions to Dr Gupta. As with the second and third witness statements made by Dr Gupta, I found Dr Gupta's oral evidence to be relevant and helpful to the issue of whether the Charging Policy Declarations should be made.

580. Dr Gupta's evidence is but one example of evidence which I received and heard which was not before the Chief Master. The same was true of the arguments of the parties, which were far more extensive than was possible on the hearing of the applications for judgment on admissions.

581. The Defendant argued that nothing had changed since the decision of the Chief Master. The Defendant argued that the Claimants' arguments were essentially the same as those advanced to the Chief Master, and that the Claimants had failed to identify any significant change in circumstances or any important evidence of which they could not have been aware at the time of the hearing before the Chief Master. I do not agree. It seems to me that my decision falls to be made on a fundamentally different basis to the decision of the Chief Master. In making my decision I have, as the trial judge, had the advantage of hearing all the evidence in the actions, so far as relevant to Trial 1, and all the arguments relevant to Trial 1. Indeed, it will be recalled that I have deferred my consideration of the question of whether the Charging Policy Declarations should be made until after my consideration of the individual issues in each of the five actions, as I have taken the view that the arguments on this question are best considered after I have seen where I have got to on the individual issues.

582. In saying this, it seems to me that the question of what I make of all the material deployed before me at this trial in relation to the claims for the Charging Policy Declarations is not directly relevant. My consideration of that material might cause me to reach the same decision as the Chief Master or a different decision. The relevant point is that, in making my decision, I am in a fundamentally different position to the Chief Master. Equally, the Defendant's argument that nothing had changed since the decision of the Chief Master seems to me to be no more than an argument that the Chief Master reached the right decision, and that there is nothing in the material before me at this trial which should lead me to think that the Chief Master made the wrong decision. I accept that this is an argument to be considered. I do not accept that this argument, if accepted, renders the continued pursuit of the claims for the Charging Policy Declarations an abuse of process.

583. It seems to me to follow, from the analysis set out above, that the authorities to which I have been referred in this context are clearly distinguishable. This is not a case where, as in *Fidelitas*, an issue was hived off for separate consideration, in the manner of a preliminary issue, following which it was not open to the losing party to have a second attempt at the same issue, in reliance upon an argument which should have been advanced as part of the original determination of that issue. This is not a case where, as in *Laemthong*, a party is seeking to have a second attempt at an interim application, without being able to point to anything

which justifies being allowed to have a second attempt. This is not a case where, as in *Chanel*, a party is seeking its release from undertakings without being able to point to any significant change of circumstances or to any evidence which was not available when the undertakings were given.

584. In my judgment it was not an abuse of process for the Claimants to pursue their claims for the Charging Policy Declarations at this trial. The applications heard by the Chief Master were applications for judgment on admissions, which failed. The hearing before the Chief Master was not a trial, and its outcome was not the dismissal of the claims for the Charging Policy Declarations. On the hearing of the applications the Claimants were not required to, and indeed could not reasonably have been expected to deploy all of the evidence and arguments upon which they might wish to rely at trial. The same applied to the Defendant.

585. This leaves the argument that there is a cause of action estoppel. The answer to this question seems to me to follow from the analysis which I have applied to the question of abuse of process. As Lord Sumption explained in *Virgin Atlantic*, the relevant principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. The relevant causes of action in these five actions are the claims for the Charging Policy Declarations; being claims which engage the discretion of the court, and require consideration of all matters relevant to the exercise of that discretion. As I have already noted, the orders made consequential upon the hearing of the applications for judgment on admissions contained no dismissal of the Claimants' claims in the five actions. The applications were dismissed. So far as the 2020 Judgment is concerned, it seems to me that it is wrong to read that judgment as a decision that the Claimants' causes of action in the five actions no longer existed because they had failed on a final basis. The Chief Master did not strike out the causes of action, nor did he give summary judgment in favour of the Defendant in respect of the causes of action. The actual decision made by the Chief Master was that the applications for judgment on admissions failed.

586. The applications sought relief on the basis of the admissions made by the Defendant in what are now the Amended Defences and Counterclaims, It would, I think, be very odd if the Claimants could not now pursue their claims for the Charging Policy Declarations, on the basis of all the material available at this trial, simply because they were unsuccessful in persuading the Chief Master that they could have that relief on the basis of the admissions. In my view the 2020 Judgment is not correctly viewed as having created a cause of action estoppel.

587. I therefore conclude that it was open to the Claimants to pursue their claims to the Charging Policy Declarations in this trial. I do not think that there is a cause of action estoppel. I do not think that the pursuit of the claims is an abuse of process.

588. With this first issue cleared away, I turn to the second broad issue, which is whether the Charging Policy Declarations should be made. So far as the relevant law was concerned, there was little or no difference between the parties, in terms of the jurisdiction which I am exercising in this respect, and in terms of the principles which should govern the exercise of the jurisdiction. Both parties

referred me to the decision of the Court of Appeal in *Rolls Royce v Unite the Union* [2009] EWCA Civ 387 [2010] 1 WLR 318. Aikens LJ delivered a judgment dissenting from the decision of the majority in the Court of Appeal. At the outset of his judgment however, Aikens LJ dealt with the question of whether a declaration should be made on the matter in issue. In giving his decision on that question, in respect of which the Court of Appeal were unanimous, Aikens LJ identified the relevant principles in the following terms, at [120]:

> *"120 For the purposes of the present case, I think that the principles in the cases can be summarised as follows:*
>
> *(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue.*
>
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
>
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*
>
> *(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."*

589. The Charging Policy Declarations are negative declarations, which seek to establish a series of negative propositions. It is clear however that the court can, in an appropriate case, make a negative declaration, provided that it serves a useful purpose; see the discussion of this issue by Lord Woolf MR in *Messier-Dowty Ltd v Sabena S.A.* [2000] 1 W.L.R. 2040, at 2049A-2051D. While it may be appropriate to exercise more caution before making a negative declaration, the matter is one for the discretion of the court.

590. The Claimants also drew my attention to the following guidance given by Neuberger J (as he then was), in *Financial Services Authority v Rourke* [2002] C.P. Rep. 14, as to when declaratory relief should be granted.

> *"It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."*

591. I start with the question of whether there is a real and present dispute between the parties over the question of whether the Charging Policy applies to the terms of any of the Tenancies. In referring to the Charging Policy I mean, as matters now stand, the Consolidated Charging Policy for 2017/2018.

592. In their Particulars of Claim in each action the Claimants rely upon a letter dated 27th September 2018, which was sent by the Defendant's solicitors, and which asserted that the terms of the Charging Policies had been incorporated into the terms of the Tenancies. The Defendant did not however maintain this position in the pre-action correspondence. On 6th August 2019 the Defendant's solicitors wrote to the Claimants' solicitors in the following terms, at paragraphs 9 and 10 of the letter:

> *"9 Fifthly, your client has in any event misunderstood the significance of the Charging Policy to our client's entitlement to recover service charges. As we set out in paragraph 1.1 of our letter dated 24 August 2018, it is our client's position that it has always been entitled to recover service charges on the basis later enshrined in the Charging Policy. That is so because:*
>
> *9.1 Written leases (whether still held or now lost) and oral leases are most likely to have made provision for the landlord to recover all (rather than merely part) of the costs it incurs in providing services to and for the benefit of the tenant – in the usual way.*
>
> *9.2 Where leases have arisen by implication, it is likely that the conduct giving rise to them will have involved full, rather than incomplete, recovery.*
>
> *9.3 Where services have been provided to the tenant otherwise than under the terms of a lease, our client will be able to recover its full costs under that separate agreement or applying ordinary restitutionary principles.*
>
> *10 In short, it is our client's position that, in the vast majority of cases, the Charging Policy will simply reflect the status quo. It is only in those rare cases where our client did not already enjoy a right to recover its costs of services that it would need to rely on the Charging Policy as having effected a variation of the parties' existing rights or, alternatively, as having given rise to an estoppel preventing a tenant who has carried on receiving the benefit of those services from disputing our client's right to be reimbursed."*

593. These paragraphs of the letter of 6th August 2019 seem to me to have made it perfectly clear that the Defendant was no longer asserting that the terms of the Charging Policy had been incorporated into the Tenancies. The essential point being made by these paragraphs, as I read them, is that in the vast majority of cases, the Charging Policy would reflect the existing position, in terms of the Defendant's contractual ability to recover service charges. This point may or may not have been a good one, but it was not an argument that the Charging Policy had been incorporated into any lease or tenancy.

594. Turning to the pleaded position, the Defendant admitted, in each of the five actions, that the Charging Policies had not been incorporated into the relevant

Tenancy. For this purpose it is sufficient to quote paragraph 42 of the Valley View Amended Defence and Counterclaim, which is in the following terms:

> *"42. As to paragraph 14:*
>
> *42.1 The Charging Policies are relied upon, in company with other communications set out in Schedule 2 hereto, in support of the Defendant's contention that it has at all times been made clear to the Claimants that they would be required to pay service charges, in respect of the costs referred to in paragraph 18.2 above, if and for so long as the Claimants remained in occupation of the Premises.*
>
> *42.2 But the Defendant does not contend that any of its Charging Policies have impliedly retrospectively varied the Claimants' existing service charge obligations and the Defendant does not contend that the relevant service charges are due pursuant to the Charging Policies (as opposed to the Claimants' tenancy at will), as the Defendant has already explained to the Claimants in a letter dated 6 August 2019 from the Defendant's solicitors to the Claimants' solicitors. The relevant service charges are instead due under the terms of the Claimants' tenancy at will."*

595. The equivalent case can be found pleaded in the Amended Defences and Counterclaims in the other four actions. Again, it is made quite clear, in each Amended Defence and Counterclaim, that the Defendant is not contending that the Charging Policy has been incorporated into the relevant Tenancy.

596. In terms of what is happening on the ground, as regards the application of the Charging Policy, I heard a good deal of evidence in this respect from the Defendant's witnesses. I highlight the following points on this evidence.

597. The Charging Policy itself contains the following statement, at paragraph 2:

> *"This policy is most relevant for currently undocumented tenancies however some parts are clearly flagged as not relevant to certain types of occupier or commissioner as other arrangements apply. More broadly, where a lease or other form of documentation is in place, the provisions of that document override any contradictory provision in this policy. Indeed, over time, it is intended that NHSPS should regularise all occupations, rendering some parts of this policy increasingly obsolete. In this context "regularise" means that either a lease, sub-lease, or an explicit formal agreement of some form is put in place to make the position between landlord and tenant/occupier absolutely clear."*

598. In the case of those of the Defendant's witnesses who gave case specific evidence it was apparent, from cross examination, that those responsible for the management of each set of Premises dealt with the raising of service charges on the basis that the Charging Policy fell to be applied. There was no evidence of any of these witnesses receiving any instruction that the terms of the Charging Policy fell to be qualified or disapplied in any way.

599. The Defendant's witnesses explained in their evidence that decisions on the applicability of the Charging Policy were made by those responsible for asset

management, rather than those directly responsible for the management of particular properties, and rather than property management accountants who dealt with the setting of service charge budgets. On the basis of this evidence the Defendant contended, in closing submissions, that the position was as follows. If the asset managers, having looked at the relevant lease, did not see anything in it which would contravene or contradict the terms of the Charging Policies, they would say nothing, and in that case, the property management accountants would go ahead and work out what was owed by the tenants. If the asset management department found something in the leases which contradicted the Charging Policies, they would then tell the practice management accountants that they had to do something different.

600. I did not hear any evidence from an asset manager, and the evidence which I did hear did not disclose any instance of an instruction from the asset management department to a practice management accountant or other person responsible for the management of a particular property that the Charging Policy should not be applied, or should not be applied in its full rigour in any particular case. In closing submissions the Claimants contended that the Defendant remained committed to the Charging Policy and sought to implement it in practice in both documented and undocumented tenancies. This submission on the facts was used as the basis for the Claimants' submission that there would be considerable utility in recording the admission of the position made in the Amended Defences and Counterclaims in a publicly available judgment and, in the form of the Charging Policy Declarations, in the order made consequential upon this judgment.

601. I will come back to the Claimants' submission as to the utility of making the Charging Policy Declarations, but in terms of the position on the ground my findings are as follows:
    (1) I am not in a position to make findings as to what is happening, in terms of the application of the Charging Policy, across the Defendant's estate.
    (2) In terms of all the evidence which I have heard in this trial, and in relation to the management of the Premises with which the five actions are concerned, I find that the Claimants are right to submit that the Defendant has, at least to date, remained committed to the Charging Policy, and has, at least to date, sought to implement the Charging Policy in practice in the case of both documented and undocumented tenancies.
    (3) I accept that it is the task of the Defendant's asset management team, as it was referred to, to review individual cases and advise the relevant persons responsible for the management of individual properties if there is a need to qualify the effect of the Charging Policy in some way. On the evidence in these five actions, I have seen no evidence of this process actually taking place.

602. Turning specifically to the question of whether the Charging Policy Declarations should be made, I have come to the firm conclusion, in the exercise of my discretion, that they should not be made. My reasons for this conclusion are as follows.

603. First, there is the general requirement that there must be a real and present dispute between the parties before the court as to the existence or extent of a legal right

between them, although the claimant does not need to have a present cause of action against the defendant. In the present case, there is no such real and present dispute. The Defendant is not contending that the terms of the Charging Policy or of its predecessors have been incorporated into any of the Tenancies. That has been made perfectly clear in the pre-action correspondence, by paragraphs 9 and 10 of the letter of 6th August 2019. The position has been made equally clear, in the five actions themselves, by the Amended Defences and Counterclaims. Equally significantly, the contractual ability of the Defendant to levy service charges pursuant to terms of the Tenancies which are in dispute in the five actions has been argued out, at length, over the course of this three week trial, with never a suggestion that the terms of the Charging Policy or of its predecessors had anything to do with the argument.

604. The Claimants sought to rely upon the decision of David Richards J in *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch). The case concerned a rights of light claim, arising out of the proposed development of the defendants' property. When proceedings were commenced by the claimants, the defendants contended that neither declaratory nor injunctive relief should be granted because, as matters stood, the defendants did not intend to proceed with the development, and thus did not threaten or intend to interfere with the rights of light. The outcome of this was that the claimants confined their claim to a declaration as to the existence of their rights of light. The question which arose for decision was whether the declaration should be made, in the light of the defendants' stance that they would not be proceeding with the development. The judge decided that the declaration should be made. As the judge pointed out, the defendants had not actually conceded that the claimants were right in saying that proposed development would infringe their rights of light. Rather, the defendants had, at best, *"put the dispute into abeyance"*, reserving the right to revive the dispute at their discretion; see the judgment at [46].

605. It seems to me that the decision in *Pavledes* is distinguishable in the present case. In *Pavledes* the position of the defendants, both in the pre-action correspondence and in the defence in the action was clearly equivocal. Indeed, the admission that the claimants' property enjoyed rights of light over the defendants' property was specifically stated to be *"on the assumption"* that the technical analysis of the claimants' surveyor was accurate. There was no commitment on the part of the defendants that this assumption was in fact correct. In the present case I do not regard the Defendant's position as being similarly equivocal. It seems to me that the Defendant has firmly committed itself, both in the pre-action correspondence and in its pleaded case, to an acceptance that none of the Charging Policies have been incorporated into the terms of the Tenancies. The Chief Master did make the point, in the 2020 Judgment, that an admission could be withdrawn with the permission of the court. Even however at the stage when the Chief Master was concerned with the five actions, he considered it inconceivable that the court would grant such a permission; see the 2020 Judgment at [55], sub-paragraph (3).

606. Second, there is the question of what utility the Charging Policy Declarations will have, as between the parties in these five actions. The answer to that question seems to me to be none. I have, in this regrettably but necessarily lengthy judgment, determined, in principle, the contractual ability of the Defendant to

levy service charges under the terms of the Tenancies. In Trial 2 there will be a determination of whether the arrears of service charge claimed by the Defendant in the five actions are actually due. Whether one is considering Trial 1 or Trial 2, I cannot see that the Charging Policy Declarations will serve any useful purpose. They are effectively redundant or, to use an alternative expression, superfluous.

607. I do not disregard, in this context or otherwise in relation to the question of whether the Charging Policy Declarations should be made, the evidence of the Defendant's application of the Charging Policy which the Claimants highlighted in their submissions. I have accepted the submission of the Claimants, in relation to the management of the Premises (the premises with which the five actions are concerned), that, at least to date, the Defendant has remained committed to the Charging Policy, and has sought to implement the Charging Policy in practice in the case of both documented and undocumented tenancies. I do not however regard this evidence as particularly significant. I have determined the contractual ability of the Defendant to levy service charges under the terms of the Tenancies. The practices of the Defendant in relation to the Charging Policy cannot affect that determination although, as it happens, the contractual ability of the Defendant to levy service charges has, on the basis of my decisions in this judgment, turned out to be substantially in alignment with the Charging Policy.

608. Third, there is the question of whether the Charging Policy Declarations will have any utility in other cases where GPs occupy premises in the ownership of the Defendant. It seems to me that this is, in theory, a legitimate point for the Claimants to raise. If I thought that the making of the Charging Policy Declarations would provide assistance in other cases, my view is that I could take this into account as a good reason for making the Charging Policy Declarations.

609. This however brings me on to what I consider to be a key difficulty with the making of the Charging Policy Declarations; namely that, depending upon how one analyses the position, they either answer the wrong question or provide a misleading answer to the right question. The purpose of Trial 1 is to determine the rights and obligations of the parties in the five actions in respect of service charges. Where a dispute arises between the Defendant and a GP practice over the obligations (if any) of the practice to pay service charges, the first question to be answered is the Trial 1 question. What are the rights and obligations of the parties (if any) in respect of service charges? This first question is not answered by saying that the Charging Policy is not incorporated into the relevant lease or tenancy or licence held by the relevant practice.

610. Beyond this however, it seems to me that a statement that the Charging Policy is not incorporated into the relevant lease or tenancy or licence has the capacity to mislead. If one asks the question, can the Defendant levy services in accordance with the provisions of the Charging Policy, the answer to the question is neither yes nor no. The correct answer, as it seems to me, is *"possibly"*. In any particular case the Defendant may or may not be able to levy services charges in accordance with the Charging Policy. All will depend upon the terms of the relevant lease, or tenancy, or licence and, if the relevant terms do not permit full recovery, upon whether the Defendant is able to establish any other legal basis for full recovery,

such as the arguments based on implied contract, restitution, and estoppel which were pleaded in the present case. As it happens, in the present five actions, the Defendant has, with some limited exceptions, established rights to levy service charges which appear to align with the Charging Policy. In other cases the position may be different. It all depends on the facts and circumstances of each case. The terms of the Charging Policy Declarations seem to me to have the potential to mislead in this context. There may or may not be a right to levy service charges in accordance with the Charging Policy. It seems to me that the Charging Policy Declarations have the capacity to mislead in this context, because they may suggest, indeed it seems to me likely that they will be taken to suggest that the Defendant cannot levy service charges in accordance with the Charging Policy.

611. In the context of other cases there is also the possibility of the Charging Policy Declarations misleading in a more direct manner. Although it has been admitted in these five actions that the Tenancies do not incorporate the Charging Policy in any way, this may not be the position in another case. In another case the Defendant may have grounds for arguing that, by some means or other, the Charging Policy does have legal effect as between the Defendant and the GP practice in that other case. In such a case it seems to me inevitable that the Charging Policy Declarations, if they have been made, will be brought into the argument, notwithstanding that they should have no application.

612. Fourth, I have a real concern as to what will happen, if the Charging Policy Declarations are made, in terms of the communication of the result of this case to other GP practices occupying properties owned by the Defendant. In the 2020 Judgment the Chief Master expressed his concerns over a letter written by the BMA to GPs on 20th August 2020. The letter was reporting on the admissions, that the Charging Policy was not incorporated into the Tenancies, which had by that time been made in the five actions. The Chief Master had the following criticisms of this letter, at [49] to [53].

> *"49. Mr Gaunt pointed to a letter from the BMA to GPs dated 20 August 2020. By that stage, NHSPS's defences and counterclaims in these proceedings had been served and the letter reported on what was described as the belated concession by NHSPS that the policy did not vary the leases. The letter went on to add that there had been a concession that the service charges were not due "because of" the charging policy. This was not an accurate statement to make, in light of the alternative grounds upon which the counterclaims are based.*
>
> *50. More worryingly, the letter goes on, after reporting that the current applications were being issued seeking declarations, that the policy does not form part of the tenancies. It then says the judgments sought would not automatically apply to any GPs practices beyond the five test claimants;*
>
> > *"… **however, they would be highly persuasive evidence that other GPs practices in similar circumstances would be able to rely on to defend themselves against their landlord."** [bold in the original]*
>
> *51. The letter appears to suggest, therefore, that the grant of declarations in the five cases before the court would provide a basis for other GPs practices to defend the type of claim NHSPS is putting forward.*
>
> *52. The next paragraph of the letter says:*

> ***"NHSPS has now agreed that the charging policy does not automatically form part of every tenancy and will not have legal status without prior agreement by the GP practice in each case."*** *[bold in the original]*
>
> *53. It seems to me, that the reference to the need for "prior agreement" does not accurately summarise the case NHSPS is pursuing in its defences and counterclaims. The claims are not of enormous complexity but there are subtleties that need to be carefully explained."*

613. Matters have now moved on, in the sense that the 2020 Judgment has been delivered, and reported to GPs by the BMA. The BMA reported on the outcome of the application for judgment on admissions and the 2020 Judgment in a letter sent to GPs on 19th February 2021. The letter was written by Dr Gupta. I have already made reference to the evidence of Dr Gupta. Attached to the letter was a template letter for use by GPs in their dealings with the Defendant. Dr Gupta told me that he was involved in the preparation of the template letter, which was prepared with the input of the BMA's lawyers.

614. Starting with the letter of 19th February 2021, it provided the following update on these five actions, under the heading of *"Case update and next steps"*:

> *"We consider the admission by NHSPS in all five claims to be a very significant victory. NHSPS had for years been informing practices they had to pay higher service charges in line with the Charging Policy without proper explanation. The claims have now finally established that NHSPS could not do this. They could not rely on the Charging Policy in isolation as a legal basis to increase charges, as the BMA had said all along. They would have to look at any service charge increases on a case-by-case basis, looking at each of the five practice's terms of occupation and explain how they say the Charging Policy applies, if at all. Through the legal action NHSPS had been forced to admit this. The practices proceeded to apply for declarations, but this was declined by the Court principally on the basis that the issue was no longer in dispute, so declarations were not required. NHSPS now needs to explain to each of the five practices the legal basis in the terms of tenancy or lease for any increased charges as well as providing an accurate detailed breakdown of all invoices and services allegedly provided."*

615. I have two concerns in respect of what was said in this part of this letter. First, the reporting of the basis of the decision of the Chief Master was incomplete. The principal ground for the decision was described as being that the issue of the incorporation of the Charging Policy into the Tenancies was no longer in dispute. This statement was only correct in so far as it identified one ground upon which the Chief Master made his decision. In the 2020 Judgment the Chief Master provided a summary of his reasons, at [56], for refusing to make the Charging Policy Declarations on the Claimants' applications. The absence of any dispute was indeed one of the reasons given by the Chief Master in this summary of his reasons, but he also had a number of other reasons upon which he relied. In particular, at sub-paragraphs (4) and (5) at [56], the Chief Master said this:

> *"(4) Mr Gaunt initially submitted that the BMA has an ulterior purpose in pursuing the applications, namely, that it will be used to encourage*

GPs not to pay service charges. However, he rightly stopped short of saying there is a risk that orders granting declarations might be misused. The BMA is, of course, a highly reputable organisation and I entirely accept that it would not in the BMA's interests to misuse the declarations, if granted. That said, I have real concerns about the statements made in the BMA's August letter. The letter shows there are difficulties in communicating both sides of NHSPS's case; one side being that the policy did not vary the tenancies and was not incorporated, the other being that the policy is central to its entitlement to recover service charges. I consider there is a real risk that if the declarations are granted, only one side of the case will be reported and that GPs might be unwittingly misled.

(5) I consider that, even if the absence of a dispute and the lack of utility are not of themselves sufficient reasons for declining to grant declarations, there are special reasons here why it would not be appropriate to grant declaratory relief. I am satisfied that the sort of recital Mr De Waal mentioned in the course of submissions would not be appropriate. Indeed, the very fact that such a 'health warning' might be necessary in the orders, suggests of itself there is a risk that the orders and declarations might be misunderstood."

616. It seems to me that what was said in this part of the 2020 Judgment comprised an important part of the reasoning of the Chief Master. So far as I can see however, none of this part of the reasoning of the Chief Master found its way into the letter of 19th February 2021. Dr Gupta confirmed to me that there was no other letter sent out to GPs giving any further explanation of the 2020 Judgment. In summary, my first concern with the letter of 19th February 2021 is that it does not seem to me to have given GPs a proper account of the reasons which caused the Chief Master to refuse to make the Charging Policy Declarations on the Claimants' applications.

617. My second concern with the letter of 19th February 2021 is more fundamental, and reflects a concern which is also raised by the evidence given by Dr Gupta in his second witness statement. In the extract from the letter which I have cited above, the outcome of the application for judgment on admissions was linked with what was said to be a need for the Defendant to explain to the Claimants *"the legal basis in the terms of the tenancy or lease for any increased charges, as well as providing an accurate detailed breakdown of all invoices and services allegedly provided"*. In his second witness statement Dr Gupta made much of what he said was the lack of clarity in the way in which service charges were dealt with by the Defendant. Importantly, Dr Gupta asserted that the Charging Policy Declarations would serve a useful purpose in assisting GP practices to obtain clarity in relation to their service charges. Dr Gupta summarised the position in the following terms, in paragraph 29 of his second witness statement:

"29. The BMA would share the declarations with practices to outline the legal position and highlight the fact that the NHSPS charging policy is not automatically incorporated into their existing agreements. This will aid GPs and the practices in seeking clarification from NHSPS and in understanding their own situation."

618. This alleged need for clarity is carried over into the template letter which was attached to the letter of 19th February 2021. After making reference to the 2020 Judgment, the final paragraph of the template letter stated as follows:

> *"Until we understand the legal basis you are relying on to increase charges, we will not be able to comment further or pay the disputed charges. We will in the meantime continue to comply with our existing legal obligations towards you of which we are aware."*

619. I am not in a position to make findings as to whether there has or has not been a lack of clarity, in terms of service charges, as between the Defendant and other GP practices. What is however clear to me is that the Charging Policy Declarations are not going to serve any useful purpose in resolving any lack of clarity which may exist in any particular case. This is illustrated by Trial 1. In determining the rights and obligations of the parties in these five actions, in terms of service charges, the fact that it has been admitted that the Charging Policy has not been incorporated into the Tenancies has been of no assistance. What has been required has been an extensive analysis and investigation of the position in each of the five actions. A notable feature of each action has been that, once the arguments over capped service charges and all-inclusive rents had been resolved, there were only a few items of service charge expenditure left to argue about.

620. In his witness statements Dr Gupta gave powerful evidence as to the problems created for GP practices by the increases in service charges which have occurred since the transfer of the relevant part of the NHS estate to the Defendant. I do not in any way downgrade the concerns which the BMA has for GP practices confronted with service charge demands which may be considerably higher than before. I am however very doubtful that it is sensible to encourage GP practices to take the approach that it is for the Defendant to do all the explaining. The unfortunate reality, as I understand the position, is that in many cases the terms of GPs' occupation are undocumented. Even where those terms are documented, there may still be scope for argument as to the existence or extent of service charge obligations. Where historical analysis is required, GP practices are likely to be in as good, if not a better position than the Defendant to provide relevant information about the service charge history of the relevant premises. In these circumstances I am not convinced that a refusal to pay service charges, pending explanation of the position by the Defendant, is the best way to engage with this problem. It seems to me that a more constructive approach would be for GP practices to take their own advice on the position, and put their particular case to the Defendant on what is and is not recoverable by way of service charges.

621. What I have said in my previous paragraph is not directly relevant to the question of whether the Charging Policy Declarations should be made. The relevant point is this. I do not think that the Charging Policy Declarations are going to assist other GP practices in their dealings with the Defendant in relation to service charges. At best it seems to me that the Charging Policy Declarations will be irrelevant. At worst, and most obviously in cases where GP practices do not take their own advice, the Charging Policy Declarations may encourage GP practices to think that the existence of the Charging Policy Declarations provides them with some sort of defence to a claim for alleged arrears of service charges.

622. While I am sure that a reputable body such as the BMA would not deliberately misrepresent the position, if the Charging Policy Declarations were to be made, I am concerned as to how the BMA would communicate the outcome of these five actions if the Charging Policy Declarations were to be made. In my view the Charging Policy Declarations are at best irrelevant, and at worst positively harmful to the process which needs to take place, between the Defendant and other GP practices, if further expensive litigation is to be avoided. I find it difficult to see how this message would get through to other GP practices, if the Charging Policy Declarations were to be made.

623. Drawing together all of the above discussion, and returning to the guidance given by Aikens LJ in *Rolls Royce*, the ultimate question is whether the making of the Charging Policy Declarations is the most effective way of resolving the issues raised. By reference to the guidance given by Neuberger J in *FSA v Rourke*, I am required to take into account justice to the Claimants, justice to the Defendant, whether the Charging Policy Declarations would serve a useful purpose, and whether there any other special reasons why or why not the court should grant the Charging Policy Declarations. By reference to the guidance provided by the authorities to which I have been referred, and having regard to all of the evidence and arguments which I have received and heard on the question of whether the Charging Policy Declarations should be made, I can summarise my conclusions in the following terms:
    (1) There is no issue in these five actions in respect of which the Charging Policy Declarations need to be made. The issues in these five actions are not resolved by the making of the Charging Policy Declarations.
    (2) I do not think that the Charging Policy Declarations will serve any useful purpose, either in these five actions or more widely. For the reasons which I have given I consider that the Charging Policy Declarations will be, at best, irrelevant and, at worst, misleading.
    (3) I consider that there are other special reasons why the Charging Policy Declarations should not be made. For the reasons which I have explained, I am concerned that the Charging Policy Declarations will not help, and may hinder the resolution of service charge disputes between the Defendant and other GP practices.

624. I therefore conclude, in exercise of my discretion and taking into account all of the evidence and arguments which I have received and heard on this question, that the Charging Policy Declarations should not be made.

Conclusions

625. I provide the following summary of the conclusions I have reached:
    Valley View
    (1) The Valley View Tenancy is a tenancy at will.
    (2) There is only one service which the Defendant, as landlord, is obliged to continue to provide under the Valley View Tenancy; namely the servicing and maintenance of the boilers which serve the Valley View Premises. The precise wording of this obligation remains to be settled, and is a matter on which I will admit limited further argument, if the relevant wording cannot be agreed.
    (3) The rent payable under the Valley View Tenancy is not all-inclusive.

(4) The Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants, to pay to the Defendant (as landlord), on demand, a sum equal to the amount that the Defendant is from time to time liable to pay the Superior Landlord, pursuant to clause 23 of the Valley View Underlease, in respect of services provided by the Superior Landlord under the Valley View Underlease.

(5) The Valley View Tenancy contains an implied obligation on the part of the Valley View Claimants, as tenants, to pay, on demand, the reasonable costs incurred by the Defendant in the servicing and maintenance of the boiler system which serves the Valley View Premises. In terms of the actual identification of these costs, I accept the wording used in the Defendant's draft order for Valley View.

(6) Management costs are, in principle, contractually recoverable under terms of the Valley View Tenancy, but only as part of the costs reasonably incurred by the Defendant in carrying out works (whether planned or reactive) of repair, maintenance, servicing, replacement or renewal of the boiler at the Valley View Premises, including its associated conduits, cables and media and in taking such other steps as may be necessary to ensure that the Valley View Premises continue to enjoy hot water and space heating.

Coleford

(7) The Defendant, as landlord, is obliged to continue to provide services under the Coleford Tenancy. The terms of the obligation are as set out in paragraph 3 of the Defendant's draft order in Coleford, including the proviso thereto. The services which are the subject of the Defendant's obligation to provide services are those listed in paragraph 1 of the Defendant's draft order in Coleford. I will hear the parties further, as necessary and in relation to the drafting of the appropriate declaration, on how to deal with the point that this list of services is expressed to be non-exhaustive.

(8) The Coleford Tenancy contains an implied obligation on the part of the Coleford Claimants, as tenants, to pay for the services provided by the Defendant. The obligation is an obligation to pay, on demand, the Defendant's reasonable costs of services reasonably provided, including (without limitation) the services listed in paragraph 1 of the Defendant's draft order in Coleford.

(9) The obligation to pay a service charge under the terms of the Coleford Tenancy is not subject to the Coleford Cap, or to any other form of contractual cap beyond the reasonableness limitations which appear in the obligation itself to pay the service charge.

(10) Management costs are, in principle, contractually recoverable under the terms of the Coleford Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in the Coleford Tenancy.

(11) There is no defence of limitation in relation to Coleford, because there are no sums which can be said to be outstanding from the 2013/2014 service charge year.

(12) The current extent of the premises demised by the Coleford Tenancy is as shown on the Coleford Current Occupation Plan. I will hear the parties further, as necessary and in relation to the drafting of the appropriate

declaration, on the question of the appropriate date to which the declaration should be tied.

(13) The proportion of the Coleford Building which the Coleford Partners have occupied in each of the service charge years for which I have made a determination (expressed in percentage terms) is as follows:
2015/2016 – 54.4%
2016/2017 – 59.55%
2017/2018 – 59.55%
2018/2019 – 66.42%
2019/2020 – 67.03%

Bushbury

(14) It is agreed between the parties that the Defendant, as landlord, is under no obligation to provide any services pursuant to the terms of the Bushbury Tenancy. I will make a declaration to this effect.

(15) On the true construction of the terms of the Bushbury Tenancy, the services for which the Bushbury Claimants, as tenants, have to pay service charges include grounds and garden maintenance (planned and reactive), snow clearing and gritting (planned and reactive), and buildings insurance. The declaration to this effect should also include a list of services for which the tenant is required to pay under clause 5.2 of the Bushbury Tenancy. For this purpose the list of services contained in paragraph 1 of the Defendant's draft order in Bushbury should be used, as a non-exhaustive list of services falling within the terms of clause 5.2.

(16) I have deferred to Trial 2 the alternative claim for a restitutionary remedy on the basis of unjust enrichment, including the question of whether the alternative claim should be determined at all.

(17) Management costs are, in principle, contractually recoverable under the terms of the Bushbury Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in the Bushbury Tenancy. The exception to this is that I do not think that management costs are recoverable, so far as they may be incurred, in relation to the landlord's costs of dealing with payments made under clause 5.2.1.

(18) There is no defence of limitation in relation to Bushbury, because there are no sums which can be said to be outstanding from the 2013/2014 service charge year.

(19) I understood it to be agreed between the parties that the current extent of the premises demised by the Bushbury Tenancy is as shown on the occupation plans attached to the Defendant's Amended Defence and Counterclaim in Bushbury, subject to the removal, from the area shown as occupied, of the first floor storage area which I have identified earlier in this judgment. I will make a declaration to this effect. I will hear the parties further, as necessary and in relation to the drafting of the appropriate declaration, on the question of the appropriate date to which the declaration should be tied.

(20) The proportion of the Bushbury Building which the Bushbury Partners have occupied in each of the service charge years for which I have made a determination (expressed in percentage terms) is as follows:
2017/2018 – 77.7%
2018/2019 – 79.44%

2019/2020 – 79.44%

St Andrews

(21) The St Andrews Tenancy is a tenancy at will.

(22) I understood it to be agreed between the parties that, under the terms of the St Andrews Tenancy, the only service which the Defendant, as landlord, is required to continue to provide is compliance with the landlord's repairing obligation in clause 5.3 of the 2004 St Andrews Lease, as imported into the St Andrews Tenancy. I will make a declaration to this effect.

(23) On the question of the services for which the St Andrews Claimants, as tenants, have to pay service charges, I will make a declaration in the terms of paragraph 2 of the Defendant's draft order, including the list of non-exhaustive services included therein. The drafting should however be revised to make it clear that the obligation to pay derives from clauses 3.2, 4.1.2, and 4.1.3 in the 2004 St Andrews Lease, as imported into the St Andrews Tenancy.

(24) Management costs are, in principle, contractually recoverable under the terms of the St Andrews Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in clause 3.2 of the 2004 St Andrews Lease, as that clause is incorporated into the St Andrews Tenancy. Management costs are not contractually recoverable, under the terms of the St Andrews Tenancy, in respect of items for which the tenant is required to pay by clause 4.1.3 of the 2004 St Andrews Lease, as that clause is incorporated into the St Andrews Tenancy.

(25) The extent of the premises demised by the St Andrews Tenancy is the same as the extent of the St Andrews Demised Premises (the premises demised by the 2004 St Andrews Lease).

(26) The proportion of the St Andrews Building which the St Andrews Partners have occupied in each of the service charge years for which I have made a determination (expressed in percentage terms) is as follows:
2016/2017 – 64.57%
2017/2018 – 64.57%
2018/2019 – 69%
2019/2020 – 71%

St Keverne

(27) The rent payable under the St Keverne Tenancy is not an all-inclusive rent.

(28) The St Keverne Tenancy contains an implied obligation on the part of the St Keverne Claimants, as tenants, to pay for the services provided by the Defendant. The obligation is an obligation to pay, on demand, the Defendant's reasonable costs of services reasonably provided, including (without limitation) the services listed in paragraph 1 of the Defendant's draft order.

(29) The Defendant, as landlord, is obliged to continue to provide services under the St Keverne Tenancy. The terms of the obligation are as set out in paragraph 3 of the Defendant's draft order in St Keverne, including the proviso thereto. The services which are the subject of the Defendant's obligation to provide services are those listed in paragraph 1 of the Defendant's draft order in St Keverne. I will hear the parties further, as necessary and in relation to the drafting of the appropriate declaration, on

how to deal with the point that this list of services is expressed to be non-exhaustive.

(30) Management costs are, in principle, contractually recoverable under the terms of the St Keverne Tenancy, as part of the reasonable costs of the services which are the subject of the tenant's obligation to pay a service charge in the St Keverne Tenancy.

(31) It is agreed that the current extent of the premises demised by the St Keverne Tenancy is all of the St Keverne Building. I will make a declaration to this effect.

(32) It is agreed that the proportion of the St Keverne Building which the St Keverne Partners have occupied in each of the service charge years to which the counterclaim relates comprises all of the St Keverne Building. I will make a declaration to this effect.

Common issues

(33) In the exercise of my discretion, and for the reasons which I have given, I conclude that the Charging Policy Declarations should not be made.

Outcome

626. The outcome in the five actions is as follows:

(1) The claims for declaratory relief made by the Claimants in the five actions are all dismissed.

(2) I will grant declaratory relief on the Defendant's counterclaims in the five actions, to the extent and in the terms set out in this judgment.

627. I will hear the parties on the precise terms of the orders to be made in the five actions consequential upon this judgment, to the extent that the same cannot (subject to my approval) be agreed between the parties. I include in this reference any dispute over the precise wording of the declarations I will be making, although I stress that this is not a licence to re-argue the terms of my decision on each such declaration. I also include in this reference the resolution of any specific matters which I have left outstanding in relation to particular declarations. I also include in this reference any directions which may be required at this stage for the purposes of Trial 2.

Postscript

628. I add two points by way of postscript, which I hope will be of some assistance to the parties and to other GP practices concerned about service charges.

629. There has been some reference to these five actions as test cases for other disputes over service charges which may arise between the Defendant and other GP practices. While I express the hope that this judgment will assist the Defendant and other GP practices in resolving disputes over services charges without the need for expensive litigation, I would be wary of classifying these five actions as test cases. As this lengthy judgment demonstrates, and as I have already said in this judgment, the resolution of a service charge dispute in any particular case essentially depends upon the evidence and arguments in that case. This is one of the principal reasons why, for reasons which I have endeavoured to explain in making my decision on whether the Charging Policy Declarations should be made, I do not think that it is sensible for any GP practice to adopt what I would describe as a policy of non-engagement; by which I mean refusing to pay service

charges pending explanation of the position by the Defendant. As I have said, it seems to me that a more constructive approach would be for GP practices to take their own advice on the position, and to put their particular case to the Defendant on what is and is not recoverable by way of service charges.

630. Finally, some of the Claimants' evidence and argument before me in Trial 1 was concerned with what was characterised as an *"inter-NHS funding gap"*, created by the move to full service charge recovery instigated by the Defendant. This judgment is concerned with the determination of private law rights and obligations existing between the Defendant and the Claimants, in their respective capacities as landlord and tenant. As I have said, if and in so far as an *"inter-NHS funding gap"* exists, the existence of that gap does not, without considerably more, have any effect on the private law rights and obligations existing between the Defendant and any particular GP practice. Equally, the question of the extent of the financial support which GP practices should or should not receive with items such as rent and service charges is a political question which is not the business of this court.

APPENDIX
PART I
(assessment of the witnesses who gave oral evidence in Trial 1)

Contextual witnesses

Dr Gaurav Gupta – Dr Gaurav Gupta is a GP and a partner in Faversham Medical Practice. He is also the Premises Policy Lead of the General Practitioners Committee England of the BMA. In that latter capacity Dr Gupta has been closely involved in the service charge issues which have generated these five actions. Dr Gupta gave only limited oral evidence. His evidence in his witness statements was not challenged, and his oral evidence was confined to answering some limited questions which I wished to ask him. I found Dr Gupta to be a helpful witness. His concern for GP practices facing problems with service charges was very clear, as was his commitment to his role in the BMA. Dr Gupta did not however allow these (laudable) factors to affect his answers to my questions. Dr Gupta's evidence was principally concerned, for the purposes of Trial 1, with the question of whether the Charging Policy Declarations should be made. I have decided that they should not be made, but it will be understood (and probably does not need to be spelt out) that this is no adverse reflection on Dr Gupta's evidence.

Adrian Smallwood – Adrian Smallwood is a qualified surveyor and now Head of Strategic Property Services at the London Borough of Enfield. He was formerly employed by the Defendant, from April 2014 to November 2017, as Principal National Asset Manager. For the purposes of Trial 1 Mr Smallwood's evidence was most relevant in terms of his explanation of the management costs which are in dispute in the five actions. Mr Smallwood gave impressive and helpful evidence, with questions in cross examination answered clearly.

Mark Smith – Mark Smith is the Chief Financial Officer of the Defendant. He joined the Defendant on 1st April 2019 and was formally appointed CFO on 1st May 2019. Mr Smith gave contextual evidence which provided general background. For the purposes of Trial 1, Mr Smith's evidence was most relevant in terms of his explanation of the management costs which are in dispute in the five actions, and in terms of his explanation of the Defendant's approach to the application of the Charging Policies. Mr Smith was a helpful and candid witness. He answered questions carefully and to the point.

Benjamin Masterson – Benjamin Masterson is Head of Companies Management within the Department of Health and Social Care. He is a non-executive director of the Defendant, having been appointed a director in 2017. He was also involved in providing what was referred to as shareholder supervision of the Defendant between 2013 and 2017. For the purposes of Trial 1 Mr Masterson's evidence was essentially background evidence. His evidence in cross examination was rather defensive at times. He did not always give a clear answer to the question, and sometimes introduced comment into his answers. These matters did not however cause me to reject any of his factual evidence which, as I have said, was not central to what I had to decide.

Michael Lewis – Michael Lewis has worked for the Defendant since April 2013, and prior to that was working for North Somerset Primary Care Trust. He is now Principal Property Finance Manager for the South West Region at the Defendant. For the

purposes of Trial 1 the evidence of Mr Lewis was essentially background evidence, the most relevant of which was his explanation of the system of apportionment used by the Defendant where a GP practice occupies part of a building. Mr Lewis gave his evidence clearly in cross examination, and was a helpful witness.

Joanne Fox – Joanne Fox is the Head of Primary Care Estates and a Senior Programme Lead for the Estates and Technology Transformation Fund for NHSE. She has been employed in the NHS since 1990. Ms Fox gave useful background evidence in her witness statement. She was only briefly cross examined, but gave clear and helpful evidence in cross examination.

Richard Harvey – Richard Harvey is employed by the Defendant as Head of Decision Support and Portfolio Analysis, having joined the Defendant in 2016 as a consultant. Mr. Harvey had particular experience of dealing with matters relating to charging and debt. He gave useful evidence relating to the Defendant's financial practices. He was clear and careful in his answers in cross examination, and his evidence was helpful.

Valley View

Dr Pauline Taylor – Dr Taylor has been a Valley View Partner since 1st April 1987. As such, she had important evidence to give in relation to the history of the Cuffley Health Centre and the Valley View Premises. I am satisfied that Dr Taylor was an honest witness, and much of her evidence was helpful. I did however find parts of her evidence unsatisfactory. She did not always have a good recollection of events. She had some difficulty, in cross examination, in explaining documents which appeared to show acceptance of service charge obligations. In particular, my impression was that Dr Taylor's concern to defend the case of the Valley View Claimants that their rent was all-inclusive coloured her recollection of relevant matters. I have identified in the relevant part of this judgment where I have not been able to accept Dr Taylor's evidence on relevant matters, and my reasons for this non-acceptance.

Donna Brydon – Donna Brydon has been employed by the Defendant as a Senior Property Manager since August 2016. She has worked for the Defendant since April 2013 and, prior to that, worked for a PCT from 2002. Ms Brydon had been dealing directly with the Valley View Premises since 2009. Her evidence in cross examination was clear and straightforward, and she gave useful evidence on the history of events in relation to the Cuffley Health Centre and the Valley View Premises.

Emma Fragola – Emma Fragola is employed by the Defendant as a Property Management Accountant. She was previously employed by the Defendant as Assistant Finance Manager. She had useful, but limited evidence to give in relation to the accounting history of the Valley View Premises. She gave clear and straightforward evidence in cross examination.

Coleford

Dr Barbara Cummins – Dr Cummins has been a Coleford Partner since January 1998. As such, she had important evidence to give in relation to the history of the Coleford Premises. I am satisfied that Dr Cummins was an honest witness, and much of her evidence was helpful. I was not able to accept some of the evidence which Dr Cummins gave in respect of the Claimants' case that the service charge liability of the Coleford Claimants was subject to the Coleford Cap. My impression was that Dr Cummins was

concerned to defend the case for the Coleford Cap, and had persuaded herself that the Coleford Partners had the expectation of a cap when in fact, as I have found, no such expectation existed. I have dealt with this in more detail in the relevant part of this judgment.

Bridget Docking – Bridget Docking has been the practice manager for the Coleford Partners since September 2001. As such, she also had important evidence to give in relation to the history of the Coleford Premises. In cross examination Ms Docking was generally helpful and straightforward. The qualification to this is that, as with Dr Cummins, I was not able to accept some of the evidence which Ms Docking gave in respect of the Claimants' case for the Coleford Cap. My impression of Ms Docking in this respect was the same as that which I formed in relation to Dr Cummins and, again, I have dealt with this in more detail in the relevant part of this judgment.

Colin Pugh – Colin Pugh has been employed by the Defendant as a Technical Services Manager since 2017. Prior to that Mr Pugh was employed by the Defendant, from 2014, as a Service Delivery Manager and, in that capacity, was directly involved with the Coleford Premises between 2014 and 2017. Mr. Pugh was straightforward in his evidence in cross examination, and gave helpful evidence on the relevant history to which he could speak.

David Morris – David Morris has been employed by the Defendant as a Facilities Services Manager since 2018, but joined the Defendant as a Service Support Manager in 2014, and then became a Service Delivery Manager in 2015. Mr Morris was only involved with the Coleford Premises from October 2018. Mr. Morris was another witness who gave, for the purposes of Trial 1, what was essentially background evidence. Subject to this limitation, Mr Morris was a helpful witness.

<u>Bushbury</u>

Elizabeth McAndrew – Elizabeth McAndrew is the practice manager for the Bushbury Partners. She has been in that role since December 2014. Ms McAndrew was straightforward in her evidence in cross examination and answered questions clearly and to the best of her ability. Ms McAndrew gave useful evidence, in particular, on the question of historic occupation of the Bushbury Building.

Margaret Moses (now Margaret Irason) – Ms Irason was employed by the Bushbury Partners between 1994 and 2019. She started as assistant practice manager but commenced work as practice manager shortly thereafter. Ms Irason continued as practice manager until 2014, when Ms McAndrew took over. Ms Irason then continued as finance officer until her retirement in 2019. Ms Irason's cross examination was relatively brief. She was straightforward and helpful in her evidence.

Elizabeth Turner – Elizabeth Turner is employed by the Defendant as a Principal Property Finance Manager. Ms Turner has been employed by the Defendant in various roles since April 2013, assuming her current role in April 2018. Ms Turner was straightforward in her evidence in cross examination. She was shown to be wrong in her recollection in one respect by reference to the documents, and accepted that she had made an error of recollection. Her evidence was useful in relation to the history of the Bushbury Premises.

Lucy Woodall – Lucy Woodall is employed by the Defendant as a Facilities Support Assistant. She has been employed by the Defendant since April 2013, first in the role of Project Support Officer and then in her current role from March 2019. Ms Woodall transferred to the Defendant from her previous employment with Walsall PCT. Ms Woodall had only limited knowledge of matters relevant to Trial 1, but gave some useful evidence on the history of the provision of services in respect of the Bushbury Building. As with Ms Turner she was straightforward in her evidence in cross examination, and accepted that she had made an error of recollection when her recollection was, in one respect, shown to be wrong on the documents.

Karen Griffin – Karen Griffin is also employed by the Defendant as a Facilities Services Manager. She assumed that role in August 2018, and was previously employed by the Defendant, from April 2013 as a Services Support Manager. She was also transferred to the Defendant, but from Dudley PCT. Ms Griffin gave useful evidence on the history of the provision of services in respect of the Bushbury Building. In cross examination she was straightforward in her evidence and, in common with Ms Turner and Ms Woodall, accepted that she had made an error of recollection when her recollection was, in one respect, shown to be wrong on the documents.

St Andrews

Dr Peter Budden – Dr Budden was a St Andrews Partner between 1995 and 2021. He had important evidence to give on the history of the St Andrews Building. In cross examination Dr Budden was an engaging witness, who gave his evidence in a helpful and straightforward manner. I found his evidence, both written and oral, very useful.

Clare Buckley (formerly Clare Lancaster) – Clare Buckley is the practice manager for the St Andrews Partners, and has been in this role since March 2015. Much of her evidence in her witness statement was directed to Trial 2 issues, with the result that her evidence relevant to Trial 1 issues was limited. Subject to that limitation, Ms Buckley gave helpful evidence.

Paul Doyle – Paul Doyle is employed by the Defendant as a Senior Property Management Accountant, and has been in this role since the statutory transfer in April 2013. Prior to this Mr Doyle worked in the same capacity for the SPCT. Mr Doyle gave useful background evidence on the accountancy history of the SPCT and the Defendant. In his second witness statement Mr. Doyle gave a good deal of relevant and helpful evidence on the instruction of Montagu Evans in the Lease Regularisation Programme, on the Defendant's apportionment methodology, and on insurance. In cross examination Mr Doyle was at times a little defensive. Subject to that, Mr Doyle was generally straightforward in his evidence. I do have one further comment on Mr Doyle's evidence, which was not directly relevant to the issues in Trial 1, but is convenient to mention in this context. Mr Doyle gave evidence of the Defendant's complaints procedure, and attempted to explain the difference between a complaint and a formal complaint. Mr Doyle was not however able to give a clear explanation of what qualified as a formal complaint, as opposed to a complaint. I return to this point below, in relation to Ms Pellow's evidence on St Keverne.

Jonathan Smith – Jonathan Smith has been employed by the Defendant since 2018 as a Facilities Services Manager. Prior to that he was a Service Support Manager, with the Defendant and originally with the SPCT. In common with Ms Buckley and Lauren

Ridgard, much of Mr Smith's evidence was directed to Trial 2 issues. Subject to that limitation, Mr Smith was also able to give useful evidence of his dealings with the St Andrews Partners.

St Keverne

Anita Dugmore – Anita Dugmore is the practice manager for the St Keverne Partners and has been the practice manager since 2012. As such, Ms Dugmore's evidence was central to the issue of whether the St Keverne rent is an all-inclusive rent. For the reasons which I have given in the relevant part of this judgment, I was not able to accept certain parts of Ms Dugmore's evidence, particularly in relation to the important meeting on 20th September 2018. My impression was the same as that I formed in relation to the relevant witnesses of the Claimants in Valley View and Coleford. I do not think that Ms Dugmore was dishonest in her evidence. Rather, she allowed her evidence to be coloured by her desire to support the claim to an all-inclusive rent.

Linda Donaldson – Linda Donaldson was the bookkeeper for the St Keverne Partners from 2008 to 2019. As such, her evidence, while set out in a short witness statement, was also potentially important to the issue of whether the St Keverne rent is an all-inclusive rent. In the event I did not find it necessary to have to reject specific parts of Ms Donaldson's evidence. While my impression was that Ms Donaldson was also concerned to support the claim to an all-inclusive rent, if she could, the documents to which she was taken in cross examination clearly undermined that claim. Ms Donaldson did not try to contend otherwise.

Karen Pellow – Karen Pellow is employed by the Defendant as a Facilities Services Manager and has been in this role since 2018. She was employed by the Defendant as a Service Delivery Manager between 2014 and 2018. She originally joined the Defendant as a Senior Estates Manager, having been transferred over from the CIS PCT. Ms Pellow gave important evidence, in her two witness statements, of the history of her dealings with the St Keverne Building and the St Keverne Partners. In cross examination Ms Pellow was straightforward and clear in her answers. Where the evidence conflicted, I preferred the evidence of Ms Pellow in respect of the September meeting to that of Ms Dugmore. I do have one further comment on Ms Pellow's evidence which, while not directly relevant to the issues in Trial 1, picks up the point I have made in relation to Mr Doyle's evidence. Ms Pellow said in her first witness statement that she did not recall any formal complaints relating to the delivery of services at the St Keverne Building. Ms Pellow was not however able to give a clear explanation of what qualified as a formal complaint. As with Mr Doyle, this did not affect my overall impression of Ms Pellow's evidence on matters relevant to Trial 1 but it should, in fairness, be recorded. Evidence of this kind did place a question mark over the reliability of what was said about complaints received.

Patrick Keeble – Patrick Keeble is employed by the Defendant as a Senior Property Manager. He commenced this employment in 2014. The St Keverne Building lies within the portfolio of properties for which he is responsible. As such, Mr Keeble had important evidence to give in terms of the history of his dealings with the St Keverne Partners and, in particular, Ms Dugmore. In cross examination Mr Keeble was not an entirely satisfactory witness. He had a tendency to answer questions on a conditional basis, suggesting that he was not sure of the answer. He was also reluctant to acknowledge points which emerged from the documents when he perceived them to be

unhelpful to the Defendant. My impression in this respect was similar to that which I have formed in relation to some of the Claimants' witnesses. All this said, I was satisfied that Mr Keeble was an honest witness, giving evidence of his recollection of events. In relation to the September meeting I preferred the evidence of Ms Pellow and Mr Keeble, where it conflicted with Ms Dugmore's evidence.

Debbie Harris – Debbie Harris is employed by the Defendant as a Central PMA Manager. She has been in this role since January 2021. From 2017 to 2020 Ms Harris was employed by the Defendant as the Senior Property Management Accountant covering Devon and Cornwall. Prior to that, from 2007 to 2017, Ms Harris was employed by the Royal Cornwall Hospital Trust as a Deputy Finance Manager. Ms Harris gave useful background evidence in relation to St Keverne. In cross examination she came across as a good witness, giving clear and straightforward answers.

PART II
(witnesses whose evidence was read)

Contextual witnesses
Andrew Thompson – Andrew Thompson is the Managing Director of Dedicated Accounts within Mitie Technical Services, a company which was retained by the Defendant, between 2016 and 2021, to provide facilities management services. Mr. Thompson was the senior person within Mitie who managed the account. Mr. Thompson's evidence, in his two witness statements, was not challenged for the purposes of Trial 1.

Bushbury
Dr Clyde Luis – Dr Clyde Luis has been a Bushbury Partner since 1995. He was unable to attend the trial to give evidence, but I was informed that his evidence was not, in any event, challenged for the purposes of Trial 1.

St Andrews
Lauren Ridgard – Lauren Ridgard is employed by the Defendant as a Facilities Services Manager. She has been in this role for around three years and, prior to that, worked as a Service Support Manager for the Defendant and, prior to the statutory transfer, for the SPCT. Her evidence, in her two witness statements, was not challenged for the purposes of Trial 1.

St Keverne
Rachel Curno – Rachel Curno is employed by the Defendant as a Senior FM Business Partner. She joined the Defendant as an Assistant Management Accountant in May 2013. Thereafter she was a Management Accountant for the south west area in 2014/2015, and a Finance Manager in 2016/2017. She was appointed to her current role in early 2018. She was unable to attend trial to give evidence, and I read her witness statement in St Keverne on this basis.